IN THE

# SUPREME COURT

## OF THE UNITED STATES

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JOSEPH BOSBYSHELL BROKERAGE COMPANY,
*Petitioner*,

vs.

ROCKWELL IRON & BRASSWORK COMPANY
OF ALA.,
*Respondents*.

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## BRIEF AND ARGUMENT FOR RESPONDENT

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IN THE

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## OF THE UNITED STATES

---

JOSEPH SCHLITZ BREWING COMPANY,
*Petitioner,*

vs.

HOUSTON ICE & BREWING COMPANY ET AL.,
*Respondents.*

No. 326

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## BRIEF AND ARGUMENT FOR RESPONDENT

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### I. STATEMENT OF THE CASE.

#### 1. The Question Presented.

This cause presents the question whether the use by the Houston Ice & Brewing Association on brown bottles (pint size) containing beer manufactured by it, of this label,

(Defendant's Exhibit L, Tr., 146):

CONTENTS { LARGE 24 OZ / SMALL 12 OZ
ALCOHOL LESS THAN 4 %
Southern Select
BEER
BREWED AND BOTTLED BY
HOUSTON ICE & BREWING ASSN.
HOUSTON, TEXAS

with this as the corresponding neck label,

(Denfendant's Exhibit M, Tr., 146):

constitutes unfair competition as to the Joseph Schlitz Brewing Company, which uses on brown bottles (pint size) containing beer manufactured by it, this label,

(Complainant's Exhibit B, Tr., 21):

with this neck label,

(Defendant's Exhibit BB, Tr., 147):

(Note: At the time the suit was filed, petitioner was using the neck label shown on page 21 of the Transcript, Exhibit "D." The neck label shown above was adopted by it after the suit was filed.)

Petitioner claimed that it did, and on June 10, 1914, presented to the United States District Court for the Southern District of Texas, at Galveston, and urged, an application for a temporary injunction restraining the Houston Ice & Brewing Company, the predecessor in title of the Houston Ice & Brewing Association, from using a label practically the same as the one just shown. The Hon. Waller T. Burns, as the judge of the court to whom the application was presented, after consideration of the same, found that the use of the label did not constitute unfair competition and refused a temporary injunction.

The case came on for trial at Houston on March 27, 1915. There was a full hearing, both by oral testimony and depositions, the trial lasting more than a week, and the court again decided that there was no infringement of any rights of petitioner by the use by the Houston Ice & Brewing Association of the label above shown, and dismissed the bill.

Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment of the lower court was affirmed. (For opinion see Tr., 179, 185.)

### 2. The Good Will of the Houston Ice & Brewing Association.

There are parties to this record who are no longer interested in the subject-matter. We refer to the Houston Ice & Brewing Company (which appears in the style of

the case) and to the officers and last board of directors of that company. The party in interest as respondent is the Houston Ice & Brewing Association, and it only.

The Houston Ice & Brewing Association is the name under which seven individuals as trustees under a voluntary declaration of trust dated October 20, 1914, hold and at the time this suit was filed owned, and operated, a brewery in the City of Houston. This association was organized for the purpose of purchasing, owning and operating all of the property of the Houston Ice & Brewing Company, a corporation, and on October 21, 1914, it did purchase all of the property of that company of every kind whatsoever, and the Houston Ice & Brewing Company thereupon retired from business and distributed its assets among its stockholders.

The Houston Ice & Brewing Company was itself the successor of another corporation of that name, which was organized under the laws of Texas in the latter days of 1892. The first Houston Ice & Brewing Company continued in business until December 31, 1901, when it was succeeded by the company of that name first mentioned. The stockholders of the first Houston Ice & Brewing Company and of the second Houston Ice & Brewing Company, and the beneficial owners of the property of the Houston Ice & Brewing Association have been substantially the same, so that there has been, practically speaking, continuous ownership by the brewery in Houston from 1892 up to the present time.

In 1893, the first year after it was organized, the Houston Ice & Brewing Company brewed 25,738 barrels of beer, including keg and bottle beer, and in 1914 the Houston Ice & Brewing Company and the Houston Ice & Brew-

ing Association together (the Houston Ice & Brewing Association having taken over the property and begun business October 21, of that year) brewed 178,000 barrels, including both keg and bottle beer, or the equivalent of over 53,000,000 bottles. (Tr., 141.) The Houston Ice & Brewing Company and the Houston Ice & Brewing Association actually bottled and sold in the ten years next preceding the year in which the case was tried, over 62,000,000 bottles of beer. (Tr., 142-143.) The receipts from beer sold in 1893 were $213,391.58; from beer sold in 1914 were $1,762,570.04, and the total receipts from beer sold since the begining of the brewery in 1893 were, on December 31, 1914, $19,504,599.39. (Tr., 143.)

Respondents have endeavored always to manufacture beer of the highest quality. They have spared no expense to accomplish this. They have endeavored to employ the most skilled workmen, to obtain the highest grade of materials, and to install the best equipment that could be obtained. (Tr., 109.) The unit in selling bottled beer is a cask of ten dozen pints. They have received on an average of $9.00 a cask for their beer *delivered,* and the Joseph Schlitz Brewing Company has received on an average of $9.75 a cask for its beer *delivered.* (Tr. 110.) They have received more for their beer than petitioner has for its beer.

### 3. The Manner in Which the Texas Breweries Obtain Their Supply of Bottles.

There are seven breweries in Texas, and the practice of each with reference to obtaining its supply of bottles is the same. They do not buy new bottles. They depend for their supply on bottles that have been used. When

beer in bottles is sold, it is not the understanding that the bottles will be returned. In other words, they become the property of the purchaser. The Texas breweries pay twenty-five cents per dozen for empty bottles. This is as much as the breweries who ship them into Texas pay for them new. (Tr., 108.) In consequence but a small part of the bottles shipped into Texas are returned. (E. L. Bielfield, sales manager for petitioner, estimated the number of their bottles returned at fifty per cent. (Tr., 49.) In this way the Texas brewers are amply supplied.

Beer bottles are, and have been during the life of the Houston Ice & Brewing Company, of two kinds—a light or green bottle, and a dark or brown bottle. Prior to 1911 the Joseph Schlitz Brewing Company shipped both light and brown bottles into Texas. (Tr., 50.) The Anheuser Busch Brewing Company and the Pabst Brewing Company shipped into Texas light bottles only. By far the greater number of bottles at this time were light bottles.

### 4. The Label Used by the Houston Ice & Brewing Company Prior to the Increase in Use of the Brown Bottle.

In the beginning of its business in 1892 or 1893 the Houston Ice & Brewing Company adopted the name "Southern Select" for its bottled beer. It has had other bottled beer from time to time, but Southern Select has at all times constituted at least half of its output of bottled beer. At the time of the trial it constituted about sixty-five per cent. of such output. (Tr., 108.) Prior to 1911 it was put up in the light colored bottles referred to, and bore this label and neck label,

(Defendant's Exhibit "D," Tr., 145):

The Houston Ice & Brewing Association continued to put up Southern Select beer in light bottles until prohibition became effective in Texas, June 25, 1918. In the twelve months preceding the trial, approximately fifteen per cent. of the total output of Southern Select beer was put up in light bottles. Where light bottles were used the white label was used. (Tr., 108.)

**5. Increase in the Number of Brown Bottles Used.**

In 1911 the Joseph Schlitz Brewing Company began to advertise widely and extensively that the brown bottle was better adapted as a container for beer than the light bottle. Mr. Bielfield, the sales manager of petitioner, testified: "Since 1911, we have advertised that the brown bottle is better adapted to beer than the light bottle." (Tr., 50.) Mr. Autrey, the Vice-President of the Houston Ice & Brewing Company, testified: "I think the bottle (brown bottle) protects the beer better than the light colored bottle, and insures its stability and color"; and that for this reason he preferred to use the brown bottle. (Tr., 108.) In 1911 the Joseph Schlitz Brewing Company began to confine itself exclusively to the use of brown bottles. This increased the number of such bottles. (Tr., 52, 53.) In a year or two after this—1912 or 1913—the number of brown bottles used by the Houston Ice & Brewing Company had increased. (Tr., 108.) Mr. Bielfield testified that other of the breweries had "switched to the brown bottle since they started their brown bottle campaign." (Tr., 49, 50.)

**6. The Custom of the Breweries to Use One Label for One Kind of Bottle, and Another Label for Another Kind of Bottle.**

Prior to 1894, when the Joseph Schlitz Brewing Co. adopted the label now in use, it had a special label for beer put up in light bottles. It was a combination of blue and gilt lettering. It never used this label on the brown bottle. For the brown bottle it had a different label. "In other words," says Mr. Bielfield, "prior to 1894 we had one label for the light green bottle, and another label for

the brown bottle." (Tr., 51.) After adopting a different label in 1894 they still followed the practice of having a different label for the light bottles, from that which they used on the dark bottles. For the light bottles they used a label with a gold background; for the brown bottles they used a label with brown background. (Tr., 51.) Mr. Kronshage testified that the label with the solid body coloring of gold was placed upon the light bottle, and the label with the brown body coloring was used on the brown bottle. (Tr., 83.) The Anheuser Busch Company's well known Budweiser is bottled in a white bottle, and has a white label. (Tr., 111.) Mr. Autrey, in connection with his testimony about changing from the light colored bottle to the brown bottle for the reasons which he had given, said also (Tr., 108): "We changed the color of the label with the color of the bottles, because it is an appropriate dress for the bottle, and we wanted to harmonize them." He testified at another place that they still use some white bottles; that approximately fifteen per cent. of Southern Select beer bottled by them "in the last twelve months" has been put up in light bottles, and that on the light bottles they use the white labels and on the brown bottles the brown labels. (Tr., 108.)

In more than one place it has been said by petitioner, or has been left by it to be inferred, that the Houston Ice & Brewing Company's discontinuance of its relations with the Joseph Schlitz Brewing Company as agent or distributor, and its adoption of the brown label, were simultaneous, and were in some way connected with each other. Such is not the fact. The Houston Ice & Brewing Company discontinued business with the petitioner in 1911 or 1912. Mr. Bielfield testified that the last shipment to the

Houston Ice & Brewing Company was made in June, 1912, and consisted of six cars. (Tr., 48.) There is given on page 132 of the Transcript a statement showing the business done by the Houston Ice & Brewing Company with petitioner from the beginning of the business in 1900. It shows six cars shipped in 1912. But when the business done in 1911, as well as that done in 1912, is compared with that done in previous years, it will be seen that the relations were practically terminated in 1910. The Houston Ice & Brewing Company did not begin to use the brown label until *August, 1913.* (Tr., 110.)

Mr. Autrey testified (Tr., 110): "At one time we sold Schlitz beer extensively in Beaumont, Texas. We did not sell it generally. We sold it at Humble and La Porte, and I do not recall any other place except Beaumont. We did not sell it in Houston. It is not true that when we discontinued the sale of Schlitz beer we began the use of brown bottles with brown labels. That had no relation or anything to do with it. We quit handling Schlitz beer long before we thought of putting a brown label on a brown bottle."

### 7. The Houston Ice & Brewing Company's Advertisement of Its Beer.

In the ten years ending December 21, 1914, the Houston Ice & Brewing Company spent for advertising its beer $124,647.96, or more than $12,000.00 a year on an average. This included newspaper and street car advertising, lithographing, cards, etc. (Tr., 107.) All of the advertising matter called attention prominently to the fact that the beer advertised was made by the Houston Ice & Brewing Company, of Houston, Texas. In addition to the labels,

of all of them, shown, see also respondent's Exhibit N from an advertisement in the Houston Daily Post of March 28, 1915 (Tr., 147); complainant's Exhibit No. 10, consisting of a brown glass sign of respondent; and complainant's Exhibit No. 11, consisting of respondent's page advertisement in the Houston Daily Post of March 24, 1915. (Tr., 139.)

### 8. Objection from Petitioner to the Use of Respondent's Label.

In the fall of 1913 respondent received a letter from Messrs. Kronshage, Hannan & McMillan, attorneys for the Joseph Schlitz Brewing Company, demanding immediate discontinuance of the use of the label it was then using. (Tr., 22.)

This label is shown in the Transcript of the record of the United States Circuit Court of Appeals in color at page 17 of said transcript, and in the transcript of this court, but not in color, at page 13.

To this letter, the attorneys for respondent replied under date of October 2, 1913, as follows (Tr., 23):

> "Your letter of September 16th to the Houston Ice & Brewing Company was referred to us. The Houston Ice & Brewing Company, as much as the Joseph Schlitz Brewing Company, desires that there should be no room for mistaking the beer of one company for that of the other, and if there is any similarity between the labels which might cause this, it resulted far from any design on the part of the Houston Ice & Brewing Company that this should be the case. It may be that the person designing the label had the Schlitz label before him in designing the letters. As to this we are not informed.
>
> "The size and shape both of the main label and the smaller label used on the bottles respectively

ought to go a long ways in preventing any mistaking one kind of beer for the other. At the same time, the Houston Ice & Brewing Company will change the lettering on its label and will endeavor to see that there is no just cause of complaint on the part of your client.

"Yours very truly,

(Signed) "BAKER, BOTTS, PARKER & GARWOOD."

As a result of this exchange of letters this label was adopted,

(Complainant's Exhibit J, p. 23):

This still did not satisfy petitioner, and an application for a temporary injunction was made.

Before the case was tried on the merits, respondent changed its label in order to have placed thereon certain statements required by the Pure Food Act, and in doing so made a slight change in the letter "S"—to improve the

general appearance of the label. (Tr., 114.) There resulted the label which is first shown in this brief, and upon this the case was tried.

## II. BRIEF OF ARGUMENT.

### 1. No Question of Infringement of Trade Mark Involved.

Petitioner's certificates of registration did not cover color (Tr., 119), and independent of color the symbols and marks on respondent's label bear no resemblance to the symbols and marks registered by petitioner.

### 2. The Question in the Case Stated.

The question is whether or not the respondent in getting up "the dress" for its package used features of the dress of petitioner's package which belonged exclusively to petitioner; and if so, whether or not as a result of this, such similarity between the two packages exists that ordinary purchasers of beer, giving such attention to the same as such purchasers usually give, will be caused to purchase one, supposing it to be the other.

Payton v. Snelling, 17 R. P. C., 48, 52, quoted in Hopkins on Trade Marks (Third Edition, 1917), Sec. 121.

McLean v. Fleming, 96 U. S., 255, 256.

### 3. The Right of Respondent to Use the Brown Bottle.

Breweries generally use the same size, shape and color of bottles. The brown bottle used by respondent is the same as the brown bottle used by petitioner, or any other brewery. Petitioner purposely refrains from putting its name on its bottles or using a special size or shape of bottle, so that dealers the country over may find a ready

sale for the empty bottles, and thus pay the price demanded for the beer.

The petitioner's manager testified on this point, as follows:

> "We could prevent the use of a Schlitz bottle by putting our name on it, but we would have no sale of beer then. It would make the beer too expensive in certain sections of the country." (Tr., 50.)

Prior to 1911, when the campaign was inaugurated advocating the brown bottle as a better container for beer because of protection from light, and when brown bottles were not so numerous in Texas, respondent used another kind of bottle, to wit, a light green bottle, and the customary package at that time for its beer was a light green bottle of this kind, with a white label. (Tr., 108.)

When the brown bottles became more numerous, respondent, preferring them because of their advantages as containers of beer, began to use them chiefly. (Tr., 108.) It is the custom of breweries to use one label for one kind of bottle, and another label for another kind of bottle (Tr., 50, 51, 83, 108 and 111); and in 1913, respondent, in adopting the brown bottle as its standard bottle, adopted a brown label to harmonize with it. (Tr., 108.)

### 4. The Right of Respondent to Use the Brown Color Selected by It for Its Labels.

Color as a feature of dress is of common right, and cannot be exclusively appropriated by anyone. Petitioner cannot monopolize the color common to its and respondent's label.

Fleishmann et al. v. Starkey, 25 Fed., 127.
Newcomer & Lewis v. A. J. Scriven Co., 168 Fed. Rep., 621; 95 C. C. A., 77.

Hopkins on Trade Marks (3rd Edition, 1917), Sec. 114.
Viavi Co. v. Vimedia Co., 245 Fed., 289.
See, also, authorities under 10, *infra*.

**5. Not One of the Features Which Specially Distinguish Petitioner's Label Appears on Respondent's Label.**

"When, as in this case and in the last, what is called the plaintiffs' get-up consists of two totally different things combined, namely, a get-up common to the trade, and a distinctive feature affixed or added to the common feature, then what you have to consider is not whether the defendants' get-up is like the plaintiffs' as regards the common features, but whether that *which specially distinguishes the plaintiffs' has been taken by the defendants,*" Payton v. Ward, 17 R. P. C., 58 (quoted in Hopkins on Trade Marks (3rd Edition, 1917), Sec. 121).

Many features of one label are radically different from anything on the other.

**6. The Features Common to Both Packages do not Constitute a Collocation Which Could Be Said to Specially Distinguish Petitioner's Package or Be Said to Be a Collocation to Which Petitioner has an Exclusive Right.**

It is not alone a label of the shape or size of petitioner's, nor such a label with the inscription that this label bears that petitioner desires to protect and monopolize. What it desires is to secure the exclusive right to the use of a *brown label* on a *brown bottle* as a trade mark for the sale of beer.

Viavi Co. v. Vimedia Co., 245 Fed., 289.

**7. No Such Similarity Between the Labels as Would Cause an Ordinary Purchaser of Beer, Giving Such Attention to the Same as Such a Purchaser Usually Gives, to Purchase One, Supposing It to Be the Other.**

McLean v. Fleming, 96 U. S., 255, 256.
Centaur Co. v. Marshall et al., 97 Fed., 785.
Fiel Co. v. Robbins, 220 Fed., 650.

See authorities under 10, *infra.*

**8. Great Weight Should Be Attached to the Conclusions of the Trial Court on the Conflicting Evidence as to Deception.**

United States v. United Shoe Machinery Co., 247 U. S., 32, at 41.
DeLaval Sep. Co. v. Iowa Co., 194 Fed., 423.
Tilghman v. Proctor, 125 U. S., 136.
American Rotary Valve Co. v. Moorehead, 226 Fed., 202.

**9. An Inspection of the Labels Themselves Leaves Nothing to Be Said to Show There Is No Unfair Competition.**

Liebig's Extract of Meat Co. v. Chemist's Co-operative Society, Rep. of Patent, Design and Trade Mark Cases, Vol. 12, 736, 738.
Lorillard v. Pepper, 86 Fed., 956, 960.

See authorities under 10, *infra.*

**10. The Authorities Abundantly Support the Position of Respondent of No Unfair Competition.**

Howe Scales Co. v. Wycoff, 198 U. S., 140.
Kann v. Diamond Steel Co., 89 Fed., 706.

E. Regensburg & Sons Co. v. Juan F. Portuondo Cigar Mfg. Co., 142 Fed., 160.
P. Lorillard Co. v. Pepper, 86 Fed., 956.
Centaur Company v. Marshall et al., 97 Fed., 785.
American Brewing Co. v. Bienville Brewery, 153 Fed., 615.
Postum Cereal Co., Limited v. American Health Food Co., 119 Fed., 848.
American Tobacco Co. v. Globe Tobacco Co., 193 Fed., 1015.
Newcomer & Lewis v. Scriven Co., 186 Fed., 621.
Coats v. Merrick Thread Co., 149 U. S., 565.
Continental Tobacco Co. v. Larus & Bro., 133 Fed., 727.
United States Tobacco Co. v. McGreenery et al., 144 Fed., 531.
Proctor & Gamble Co. v. Globe Refining Co., 92 Fed., 358.
Philadelphia Novelty Mfg. Co. v. Rouss, 40 Fed., 586.
Fleishmann et al. v. Starkey, 25 Fed., 127.
Coca-Cola Co. v. Glee-Nol Bottling Co., 221 Fed., 61.

**11. Conclusion.**

## III. ARGUMENT.

### 1. No Question of Infringement of Trade Mark Involved.

Before proceeding to a discussion of the claim of unfair competition made by petitioner, it may be well for purposes of elimination to call attention to the fact that there is no question of infringement of trademark involved. The Federal statute has no application, because none of petitioner's registrations refer to color as an identifying mark. The marks and symbols registered by petitioner are inscriptions used on the label. If any confusion results from the use by petitioner of the labels involved, this comes about, not from anything in respondent's marks similar to those of petitioner, but from the fact that petitioner has used the registered marks and symbols in connection with a thing not registered—that is, the body color of the label itself. If confusion exists, it results from the use by both petitioner and respondent of the brown bottle and brown body color of the label, and not from any similarity between the registered marks.

The certificate showing the first registration of petitioner's trade mark introduced by it in evidence contains the following statement:

> "Said trade mark consists of the word 'Schlitz' in heavy, characteristic, white script. This trade mark has generally been arranged in rhomboid form, as shown in the accompanying fac simile in black and white, in which the word 'Schlitz' apears in charasteristic letters, slanting upward from left to right, in an oblique line, with a globe and belt. The symbols employed as a general trade mark of the complainant for years past have been at immediate left of said word 'Schlitz.' *The color of the background of the trade mark as used with the various brands of bottled*

> *malt liquors varies, and aims to correspond with the color of the beverage, so as to indicate at a glance the brand itself*—for example, the golden background being applied to a light, pale beer, and a dark color to a dark, stout beer, and the light. *The various accessories* which are used as trade marks *may be varied* at pleasure, altogether omitted, or added to, without materially altering the character of the said trade mark, the essential feature of which is the word 'Schlitz,' in heavy, characteristic, white script." (See complainant's Exhibit No. B, Tr., 119.)

By registrations Nos. 87,489 (Tr., 138) and 90,587 (Tr., 118) petitioner registered separately the two principal elements covered by its first registration. In neither of these registrations, however, is there any reference to the body color of the label, nor is there any attempt to acquire an exclusive right to the body color of the label itself.

We do not understand that petitioner contends, and certainly cannot believe that anyone could contend, that the marks and symbols used by respondent on its label resemble the trademark of the petitioner so nearly as to be "likely * * * to be mistaken for it by the public." In other words, if the marks and symbols used on the respondent's labels were in black ink on white paper, no one would contend that the labels so made could be confused by any ordinary person. Even if petitioner had registered a trade mark which consisted of its marks and symbols on a label of a particular shape and color, it would not constitute an infringement of petitioner's trade mark to use the same colored label, provided as in the

case of respondent's labels, the distinguishing features of the two labels otherwise were such that they would not likely be mistaken one for the other.

There is left in the case only the question of unfair competition.

### 2. The Question in the Case Stated.

**The question is whether or not the respondent in getting up "the dress" for its package used features of the dress of petitioner's package which belonged exclusively to petitioner, and if so, whether or not as a result of this, such similarity between the two packages exists that ordinary purchasers of beer, giving such attention to the same as such purchasers usually give, will be caused to purchase one, supposing it to be the other.**

"He (the plaintiff) must make out, not that the defendant's are like his by reason of those features which are common to them and other people, but he must make out that the defendant's are like his by reason of something peculiar to him, and by reason of the defendant having adopted some mark, or device, or label, or something of that kind, which distinguishes the plaintiff's from other goods which have, like his, the features common to the trade. Unless the plaintiff can bring his case up to that, he fails." (Payton v. Snelling, 17 R. P. C., 48, 52, quoted in Hopkins on Trade Marks (3rd Ed., 1917), Sec. 121.)

"A court of equity will not interefere when ordinary attention by the purchaser of the article will enable him at once to discriminate the one from the other. Two trade marks are substantially the same in legal contem-

plation if the resemblance is such as to deceive ordinary purchasers, giving such attention to the same as such a purchaser usually gives, and to cause him to purchase the one supposing it to be the other." (McLean v. Fleming, 96 U. S., 255, 256.)

### 3. The Right of the Respondent to Use the Brown Bottle.

The most conspicuous part of the dress of respondent's package is the brown bottle. That respondent has a perfect right to use such a bottle cannot be questioned. In fact it may be unreservedly stated that the use of such bottle by respondent is openly invited by petitioner.

Mr. Bielfield, manager of the bottling department of petitioner, whose testimony has previously been referred to, testified that of the 50,000,000 bottles shipped to Texas in the six years preceding 1912, only about fifty per cent. were returned; that petitioner encouraged the sale of such bottles in such States as Texas; that they could prevent the re-sale of such bottles by having the name of the brewery blown in them, but this they could not afford to do; that unless the dealer in Texas could sell their bottles freely for local use he would not buy their beer; that the beer would be too expensive to the dealer unless he could get the additional revenue arising from the sale of the bottles; and that for this reason they encouraged the sale of the bottles.

The bottle referred to is the same as any other brown bottle, whether used by petitioner or by other breweries. The petitioner buys and uses bottles purchased from all quarters, as does the respondent. In 1914 petitioner used only thirty per cent. new bottles. The remainder of the bottles used by it were bottles which

had been previously used by it or other breweries, the bottles being gathered together indiscriminately.

There will, therefore, as stated, be no question of the right of respondent to use the brown bottle.

### 4. The Right of Respondent to Use the Brown Color Selected by It.

The next most conspicuous feature of the dress of respondent's package is the color of the label used. That respondent and all the rest of the public have a perfect right to use this color, and that there can be no monopoly of it by petitioner, is equally well settled. The law is well expressed in the opinion of Justice Cole in Fleischmann et al. v. Starkey, 25 Fed., 127:

> "The complainants are the owners of certain trade marks used upon their packages of compressed yeast, and they charge the defendant with an unlawful imitation of the same. It is clear, on a comparison of the labels, that the *defendant is not guilty* of any infringement *unless the use of a yellow-colored label makes him chargeable.* The position taken by the complainants that the essential part of their trade marks consists of a label having a yellow color, and that, therefore, they cover all yellow-colored labels used upon compressed yeast, and that the use by the defendant of a yellow-colored label upon the compressed yeast made and sold by him constitutes an unlawful imitation of their trade marks. The defendant has taken no testimony. The evidence of the complainants goes to prove that yeast with a yellow label sells readily, while yeast with a white label, or any color other than yellow, sells with difficulty—the cause of this being the reputation acquired in the market of the article manufactured by the complainants; and, further, that the public are deceived into buying other and inferior yeast having a yellow label as the genuine yeast made by them. *This case*

*narrows itself down to the question whether a label of a single color, like the one in controversy, is the lawful subject of a trade mark apart from any name, figure, or device with which it may be connected, so that a person who adopts a similar color upon his label may be charged with an unlawful imitation.* Color often serves as the groundwork of a trademark, and it may be a very essential element in its composition. In determining the question of infringement, it is often a very important circumstance. Browne, Trade Marks, pars. 263, 265, 267. But the term 'Mark' implies form rather than color, and it consists of some peculiar name, symbol, figure, letter or device whereby one manufacturer distinguishes his goods from like goods sold by other persons. Falkinburg v. Lucy, 35 Cal., 52. *The color of a label, apart from a name or device, can hardly be the subject-matter of a trade mark. The effect would be that a single manufacturer might acquire the exclusive right to the use of labels of a certain color, or to the colored paper in which his goods might be wrapped.* This might seriously interfere with trade and with legitimate competition. Browne, Trade Marks, pars. 271, 272. Whatever view may be taken by the French courts in the cases referred to by the learned counsel for complainants, we know of no American or English authority which goes to this extent. On the contrary, so far as the point has been touched upon in the adjudicated cases which have come to our notice, an opposite conclusion seems to have been reached. Falkinburg v. Lucy, *supra;* Faber v. Faber, 49 Barb., 357.

"It follows that the defendant, in using a label of a yellow color, is not guilty of any infringement of complainants' trade marks, and that the bill should be dismissed."

In a later case (Newcomer & Lewis v. J. A. Scriven Co., 168 Fed. Rep., 621, 94 C. C. A., 77) the doctrine is

thus aptly expressed by Judge (later Mr. Justice) Lurton:

> "Color, except in connection with some definite arbitrary design, such as impressed upon a circle, star or other figure, or employed in definite association with some other characteristics which serve to distinguish the article as made or sold by a particular person is not the subject of monopoly as a trade mark."

In Hopkins on Trade Marks (3rd Edition, 1917), Sec. 114, it is said:

> "It is a well settled rule that there can be no trade mark right in the mere form, size or color of an article used commercially, or the form, size or color of the package containing it."

**5. Not One of the Features Which Specially Distinguish Petitioner's Label Appears on Respondent's Label.**

Passing from the size, shape and color of the bottle to the color of the label, and from the color of the label to the other distinguishing features of it, we come to inquire what, if any, of the features which specially distinguish petitioner's label appear on respondent's. "The only question you will have then to consider," said the court in Payton v. Ward, 17 R. P. C., 58, quoted in U. S. Tobacco Company v. McGreenery et al., 144 Fed., 531, "is whether the defendants' get-up is so like the plaintiffs' as to be calculated to be mistaken for it. But when, as in this case and in the last, what is called the plaintiffs' get-up consists of two totally different things combined, namely, a get-up common to the trade, and a distinctive feature affixed or added to the common feature, then what you have to consider is not whether the defendants' get-up

is like the plaintiffs' as regards the common features, but whether that which specially distinguishes the plaintiffs' has been taken by the defendants."

We should look, therefore, to see what features specially distinguish the petitioner's label, and whether or not they, or any of them, appear on respondent's. The features which specially distinguish the petitioner's label are:

(1) The size and shape of the label.

(2) The name "Schlitz," with a characteristic "S" and paraph.

(3) The trade mark in blue of a globe encircled by a belt with the word "Schlitz" thereon, the word "Export" above the globe, and the words "Joseph Schlitz Brewing Company, Milwaukee, U. S. A." beneath it.

(4) The legend "The beer that made Milwaukee famous."

(5) The legend "The Brewery's own bottling."

Not one of these distinguishing features is to be found on the respondent's label.

The features of the two labels which are common are:

(1) The color [We have already referred to this. The color is not identical (Tr., 21 and 146), but may be so, and will be treated by us as if it were.]

(2) The white marginal line. (Nothing, we submit, is more common than a marginal line for a label, and this could hardly be said to be distinctive or peculiar.)

(3) Block letters in white. (White is the color in which the printing would naturally appear. It is the color of the paper before it is made brown for the label, and the white letters are made by simply leaving part of the original color of the label unchanged. Such lettering

could not be said to be original, distinctive or peculiar.)

(4) The words "Southern Select" on the one, and the word "Schlitz" on the other, appear in script of white letters margined in blue, the letters slanting from left to right. ( Nothing is more common, we submit, than this style of printing. Slanting inscription of this kind cannot be said to be original with petitioner.)

(5) Blue appears in the trade mark of each label. (On the petitioner's label it is solid, and on the respondent's label it is a ring.)

(6) Both contain the statements as to volume and alcoholic strength required by the Pure Food Act. (But on respondent's label this is in white, and on petitioner's label it is in black, and occupies a different position on one from the other.)

The distinguishing features are most marked. They may be put down as follows:

(1) The size and shape of the label.

(2) The name of one beer is "Schlitz"; the name of the other is "Southern Select."

(3) One bears the legend "The beer that made Milwaukee famous" in a prominent position. The other contains no such legend, but plainly and prominently states that the bottle contains beer "BREWED AND BOTTLED BY HOUSTON ICE & BREWING ASSOCIATION, HOUSTON, TEXAS."

(4) The trade mark of petitioner has already been described. The trade mark of the respondent which appears on the label is altogether different, as will appear from the label, the most prominent feature of it being a bright red star in the center of it, with a white magnolia on the star. No such coloring appears on the label of

petitioner. This trade mark of respondent has been used since May, 1892. (Tr., 140.)

(5) The difference in shape of the labels requires a difference in dress for the bottles. Respondent's rectangular label is pasted near the bottom of the bottle, with the lower edge of the label parallel with the bottom of the bottle. Petitioner's label, in order that its sides may be kept parallel with the sides of the bottle, is placed on the bottle at an angle upward and towards the right.

There are other distinguishing features of the two packages with respect to labels: (1) Petitioner uses, or at the time the suit was filed used, no neck label on its bottle, but instead a small crescent shaped label in two colors is placed below the neck of the bottle. It does not extend so much as half way around the bottle. (See Exhibit "D," Tr., 21.) Respondent's label is a long, narrow, rectangular strip, and when applied to the bottle, makes a paper band extending entirely around the neck, and is done in five colors. Petitioner's crescent has on it the words "SCHLITZ BOTTLED AT THE BREWERY." The respondent's label has on it the words "SOUTHERN SELECT," and in prominent letters the name and address of respondent, with the trade mark in the same colors and lettering as on the main label. (2) Each brewery affixes to the cork of its bottle a tin or metal tag, with the name of the brewery plainly printed thereon.

Only those features of dress of petitioner's package can be looked to in determining whether or not there has been unfair competition, which specially distinguish this dress, and are the exclusive property of petitioner, and not those features which are common. We cannot look to

the brown bottle, because it is common. We cannot look to the brown label, because it is common. We cannot look to the white lettering, because it is common. We cannot look to the use of some blue coloring on the label, because this is common. The petitioner "must make out, not that the defendant's are like his by reason of those features which are common to them and other people, but must make out that the defendant's are like his *by reason of something peculiar to him, and by reason of the defendant having adopted some mark or device or label or something of that kind which distinguishes the plaintiff's from other goods which have, like this, the features common to the trade.* Unless the plaintiff can bring his case up to that, he fails." (Payton v. Snelling, *supra.*) We submit that by this test the petitioner has failed.

We may remark in passing, and perhaps should do so, that the Schlitz label on page 13 of the Transcript is not the proper one to be compared with the one immediately below it on the same page. The Schlitz label there shown is the label for the *quart* bottles. The respondent's label there shown is (or rather was, it now being abandoned) for the *pint* size. The Schlitz label for the pint size, which is the one with which the comparison should be made, appears on page 21 of the Transcript.

### 6. The Features Common to Both Packages do not Constitute a Collocation Which Could Be Said to Especially Distinguish Petitioner's Package or Be Said to Be a Collocation to Which Petitioner has an Exclusive Right.

If there are no distinctive or original features of petitioner's label which, taken singly, are to be found on re-

spondent's label, petitioner, neverthless, contends that the features of its package constitutes a collocation which itself amounts to a distinguishing feature, and for this reason the use by respondent of its label should be enjoined.

If the combination of features on petitioner's label was new or original, the contention of petitioner would be more persuasive. At this point in the brief it cites Anheuser Busch, etc., v. Clarke, 26 Fed., 410. We quote from the brief at this point (p. 101):

> "In *Anheuser Busch v. Clarke*, 26 Fed., 410, it appears the complainant was the first to use for bottled beer a label of customary size, with a small diagonal red band extending *downward* from left to right, with the name of the kind of beer 'Pale Lager,' appearing in white letters on the band. It appears that the defendant used a label of customary size which also consisted in part of a small diagonal red band extending *upward* from left to right, with the kind of beer, 'Extra Pale,' also appearing in white letters on the band. An inspection of the labels reproduced in color in Cox's Manual of Trade Mark Cases, p. 456, will show that they were otherwise strikingly dissimilar.
>
> "*No question of trade mark rights were involved*, but the court says:
>
> " 'The complainant's affidavits go to show that the complainant was the first to use for beer a label with a diagonal red band with the name of the kind of beer appearing in white letters on the red band, and that he has been habitually using this label for two years.
>
> " 'The label is a very noticeable and distinctive one by reason of the diagonal red band.
>
> " 'The result of the effect upon the eye from seeing a number of bottles is, that it is a beer labeled with a diagonal red band, and the more frequently one sees it the more this effect is deepened.

"'It does not appear altogether probable that a consumer who had been used to getting bottles labeled with complainant's label would more and more rely on the diagonal red band as its distinctive mark, and would be likely to accept the respondent's beer with his diagonal red label on it as supplying what he was it the habit of getting.

"'There is nothing in the difference in the labels calculated to counteract this, and I think it is a strong case of a similarity likely to deceive.'"

This case, we think, aptly illustrates the fallacy of petitioner's position. In the Anheuser Busch case it was not the use of red by complainant which the court protected, but it was *the use of red in an original and characteristic* way that was protected. The public had been accustomed to using red generally. The public had the right to continue to use red generally. But no one of the public had been using a *diagonal red band* on a label as a trade mark for beer. It was the *diagonal red band* that was original and was protected; not the color red.

So that if here the collocation was new and original, the case might be different in this aspect of it. But of what does the collocation consist?

(1) The use of the color brown for a label on a brown bottle. This is too elementary to be exclusive or original as against another user where the label is altogether a different size and shape.

(2) The use of white letters on a brown label on a brown bottle. We submit that in this combination there is nothing original.

(3) The use of blue in what could hardly be said a conspicuous manner on such a brown label with white letters on a brown bottle. Leaving out of consideration

altogether the features in which the labels are radically different in appearance, we submit that there is in this combination carried in this way to the fourth degree nothing which can be said to involve a use which could be held to be exclusive, or from which the public should be barred.

If it could be said to create an original and exclusive right to the collocation for one in designing a label merely to do so commonplace a thing, for example, as to select brown paper, have the inscription in white, have some of the letters block letters and others script, and use blue for portions of the printing, there would be but few labels which did not violate someone's rights.

In United States Tobacco Company v. McGreenery et al., 144 Fed., 531, it is said:

> "That the packages considerably resemble each other is obvious, but most of the resemblance arises from features which have been combined in common use, and to which no one has exclusive right. That anyone is deceived by the size, shape, tinfoil, or general makeup of the package, or by its paper, lettering or color, does not help the complainant's case. All these are old, separately and in combination. The complainant must show deception arising from some feature of its own, not common to the public. As was said in Coats v. Merrick Thread Co., 149 U. S., 562, 573, 13 Sup. Ct., 966, 970, 37 L. Ed., 847, the purchaser of thread is chargeable with knowledge of the fact that any manufacturer of six cord thread has a right to use a black and gold label, *and is bound to examine such label with sufficient care to ascertain the name of the manufacturer.*"

Other decisions denying such a right will appear later on herein.

It is not alone a label of the shape or size of petition-

er's, nor such a label with the inscriptions that this label bears which petitioner desires to protect and monopolize. What it desires is made manifest by this suit and by its brief, namely, to secure the exclusive right to the use of a brown label on a brown bottle as a trade mark for the sale of beer. When objection was first made by petitioner to the use by respondent of the label appearing on its bottle beer, respondent, through its attorneys, immediately offered to change the only feature of the label upon which alone any criticism could have been made. (Tr., 30.) The letter "S" in the words "Southern Select" on its label resembled the "S" in the word "Schlitz" on petitioner's label, although neither differed very much from ordinary script. And respondent did change its label in this particular at once, adopting an altogether different "S," and discarding the paraph on its first label, thinking that it had removed all possible grounds of objection. But this was not so. It had not changed the *color* of the label. The objection still remained, and, as respondent has since learned, will continue to remain as long as a brown label is used on a brown bottle, no matter what the inscriptions may be or what other distinguishing marks it may bear.

Petitioner refers in its brief in the Circuit Court of Appeals (pages 64 and 65) to labels, the use of which it has stopped. It boasts that as to some of such labels, only the color was the objectionable feature. On pages 67 to 69, it speaks of Lea & Perrins' sauce as being known as "Red Label Sauce"; of Curtis' catsup as being known as the "Blue Label Catsup"; of Kingsford's corn starch as being recognized as the "Yellow Wrapper Corn Starch"; of Palm Olive Soap as being the soap of the "Olive Green

Wrapper"; of "White Label Bass," bottled by McMullen, of New York; of "Red Label Bass," bottled by another bottler; of "Dog's Head Bass," bottled by still another bottler, and continues:

> "The Schlitz Brewing Company has been bottling its own beer for over twenty years. For twenty years its product destined for interstate and international trade has been put up in a *brown bottle, bearing a brown label.* * * * A beer in a *brown bottle,* bearing a *brown label,* to the consuming public, means 'Schlitz.' 'Schlitz' is *the brown label beer.*
>
> "The use of a brown label on a brown bottle for a period of twenty years to the exclusion of the world has made 'Schlitz' beer *the brown label beer.*"

No difference in inscriptions or marks on the label will suffice for petitioner's purposes. It wishes to have a monopoly of the field of a brown bottle and a brown label. It recognizes that the confusion in those few isolated instances related in the court below, in which the confusion was honest and genuine, resulted not from any similarity of the inscriptions or marks on the labels, but from the use of a brown label on a brown bottle.

Since petitioner would be equally opposed to the use by respondent of the brown label on the brown bottle, if the marks and inscriptions on respondent's label were changed, or no matter what the marks and inscriptions on such a label were, it is fair to assume that it is not the design of respondent's label to which it really objects, but it is its color, and that petitioner's efforts are to secure for itself, by this litigation, something to which it

is not legally entitled, namely, the exclusive right to the use of a brown label on a brown bottle. The position that it takes now and then that it bases its right to the protection which it asks upon a collocation consisting of the color brown and other features, is a mere pretense.

### 7. No Such Similarity Between the Labels as Would Cause an Ordinary Purchaser of Beer, Giving Such Attention to the Same as Such a Purchaser Usually Gives, to Purchase One, Supposing It to be the Other.

To entitle petitioner to the relief prayed, it must show more than that respondent has used features of the dress of petitioner's package *which belonged exclusively to petitioner*. Up to this point we have referred only to this. Petitioner must show also that, as a result of this, such similarity between the two packages exists that ordinary purchasers of beer, giving such attention to the same as such purchasers usually give, are caused to purchase one, supposing it to be the other.

What is the similarity to the distinctive features of another's label which will cause the respondent's label to be enjoined by a court of equity?

This question has been repeatedly answered by the courts.

> "True similarity is the likeness by which the *ordinary purchasers,* buying with *ordinary caution,* are likely to be misled. The perception of the extremely stupid or the extremely brilliant mind is not to be considered. The law presumes that the purchaser whom it must protect *en masse* is a man of ordinary intelligence and sense, and it is further presumed that in the buying he will use ordinary care, no more,

no less." (Nims, on Unfair Business Competition, paragraph 40.)

"A court of equity will not interfere when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other. Two trade marks are substantially the same in legal contemplation if the resemblance is such as to deceive ordinary purchasers giving such attention to the same as such a purchaser usually gives, and to cause him to purchase the one, supposing it to be the other." (McLean v. Fleming, 96 U. S., 255, 256.)

"The maker of goods, in choosing a name, is not bound to insure against the negligent buyer, neither he nor his competitor has a right to the monopoly of trade of the careless or heedless, or those who have no preference as to which brand of goods they purchase. The law of unfair trade is intended to protect those who are careful—discriminating—in their buying, and who have preferences as to what they buy." (Nims, on Unfair Business Competition, paragraph 40.)

Counsel for petitioner, in their zeal in behalf of their client, have overlooked the fact that probable deception is the essential basis of their suit, and conceive themselves entitled to a judgment which will secure to their client a monopoly of brown body color beer labels. Aside from the fact that they could not acquire a property right in color alone, priority in the adoption of any label would not be sufficient unless the label charged to be an infringement was calculated to deceive. This was well stated by Justice Romer in Payton & Co., Ltd., v. Snelling-Lampard & Company, Ltd. (R. P. C., Vol. 17, 48, 53.)

"Too often it is supposed that the trial of that issue is the same thing as trying another question, namely, whether the plaintiff has not been the first person to adopt a novel get-up, and it seems to be supposed by some that if the plaintiff establishes in a

case like this that he is the first person to adopt what is called a new get-up, or a novel get-up, then the defendant could be restrained, if the defendant, being in the same trade, adopts that novel get-up. Of course, the two questions are really quite distinct. A trader, by adopting a novel get-up, does not thereby acquire a monopoly in that get-up."

Much has been said by petitioner about the "unwary purchaser." The "unwary purchaser" is included in the rule laid down in McLean v. Fleming. The type of the ordinary purchaser there referred to is found by taking into consideration *all* purchasers of beer, the wary and the unwary. Much has been said also about the "Character of the Article"; "Use to which the Article is Put"; "How Sold"; and "The Manner in which the Article is Sold." All these are necessarily taken into account in determining the characteristics of the "ordinary purchaser of beer," and in ascertaining the attention "which such purchasers usually give when buying beer," and are embraced in the rule laid down by the Supreme Court in the case mentioned.

Judge Sanborn, in Centaur Co. v. Marshall et al., 97 Fed., 785, in which two labels, each connected with the sale of Castoria, were involved, said:

"Every purchaser is charged with knowledge of the fact that anyone may make and sell Castoria, and if he seeks that made by one manufacturer, rather than that prepared by another, it is his duty to examine the wrapper with such a degree of care as will ordinarily ascertain who the manufacturer of the article which he purchases is. *The law imposes no duty upon the appellees to see to it that the careless and indifferent know that the Castoria which they buy is made by the appellant, and not by another.* They discharge their full duty to the appellant if they so dress

> their product that one who seeks to ascertain whose manufacture it is can readily learn, by a reasonable examination of their wrappers, whether it is made by the appellant, or by themselves."

So it is with beer. It is a drink which has no distinctive name. By whatever brewery made it is called beer. Any manufacturer of the article may use the name "Castoria." Any brewer may use the brown bottle. Any brewer may use a brown label. The public is charged with the knowledge of this law. The members of the public so charged include the ignorant as well as the intelligent; the illiterate as well as the literate. Under these circumstances it necessarily follows that if anyone is so discriminative that he really prefers one beer to another, he *must* pay *some* attention to what he is buying; "it is his duty," in the language of Judge Sanborn, "to examine the wrapper with such a degree of care as will ordinarily ascertain who the manufacturer of the article which he purchases is." This information as to the manufacturer, whether in the form of a trade mark or a name, ought not to be far to seek. The name of the manufacturer ought to stand out boldly, either by sign or by word. We submit that in this case it does.

Petitioner offered a number of witnesses on the trial below whose testimony apparently was offered to prove actual deception by sales of respondent's beer as and for that of petitioner's. Portions of the testimony of so many of these witnesses were given in petitioner's brief in the Court of Civil Appeals, and there is such necessity from respondent's standpoint of giving a fuller, if not a fairer statement of the testimony of most of the witnesses, we shall be required to trespass upon the time of the court

to review this testimony at somewhat greater length than we should prefer to do. A careful review of all of the testimony as to deception offered by petitioner, *disregarding that offered by respondent*, will show, we believe, a preponderance of evidence in favor of the contention of respondent that there is no such similarity between the labels that the ordinary person, giving such attention to the same as such a person usually gives, will be deceived.

W. F. Blum, a wholesaler at Temple, who testified that the respondent had taken awey the agency from him (Tr., 58), testified on direct examination that he had seen Southern Select sold for Schlitz. (S. F., p. 8.) On cross-examination he testified that he had seen this done in Temple a little over a week ago. When asked how many times before that he replied that he did not pay so much attention to it, but that he knew that it hurt his sale of Schlitz; that that was the reason he knew; that he went to a saloon man and asked him the reason why he was not handling any Schlitz, to which he replied that he had some Southern Select, was giving that to his patrons, and that "there was no kick." He says that that was all the saloon keeper told him; *that he did not say anything about fooling the patrons.* (Tr., 59.)

Mr. W. F. Buesing, a saloon keeper from San Benito, testified that he had seen his bartender get mixed, sometimes give Schlitz for Southern Select, and sometimes Southern Select for Schlitz. That this resulted from an honest mistake on the bartender's part; that he had seen it happen two or three times a week. (Tr., 59.) That Mr. Bernd, an employe of the Houston Ice & Brewing Company, who had been drinking Southern Select at his place for two or three months, came in and called for Southern Select, that the bartender gave him Schlitz,

that Mr. Bernd "took it up, and was just ready to take a drink, and he noticed it, and he said, 'look here, Dutch, I called for Southern Select.'" (Tr., 60.)

Clarence Selvage, a liquor drummer, testified that the first time he saw Southern Select put up in brown bottles he was in Brazos County; that he had ordered Schlitz, and was served respondent's product, that he was drinking the beer, when his attention was called to the label, and he examined it, and saw that it was not Schlitz. (Tr., 61.)

The label about which Selvage was testifying is not the label now in use by respondent, nor is it the one involved in this suit. With reference to the label now in use, Selvage testified that so far as he knew, he had never been deceived by it; *that he would not have any trouble in recognizing a bottle so labeled as not being a Schlitz bottle if he looked at it.* (Tr., 62.)

Frank Williamson, the gentleman who with an apparent reluctance admitted that he had an arrangement with petitioner under which he was interviewing witnesses and procuring their attendance at the trial, testified as follows:

> "A. I was down in Brownsville; I had some business there—I had been in Houston for a couple of months, and I went back to Brownsville, and in walking around, I met a friend of mine, and I said, 'Suppose you and I have a drink,' and he said, 'All right,' and we went in and walked up to the bar, and I said, 'What will you have,' and he said, 'What do you drink?' and I said, 'I am going to take a bottle of Schlitz,' and he said, 'That will do me,' and I turned to the bartender and I said, 'Give us two bottles of Schlitz,' and he went to the ice box and drew out two bottles of Southern Select, and my friend did not detect the difference until I called his attention to it." Tr., 64.)

McIntire, the man referred to in Williamson's testimony as the one who had drunk Southern Select for Schlitz beer, testifying about the *same incident*, said:

"Q. How did you happen to get together?

"A. I was coming from tin shop—I had had a piece of work at the tin shop—and I was walking up the street, and he said, 'Hello, Mack,' and I said, 'Hello, Frank,' and he said, 'Will you have a bottle of beer?' and I said, 'Sure, I would not mind,' and he said, 'Well, we will drop in here,' and we stepped in there, and he said, 'What will you have,' and I said, 'I will take beer—give me a glass of beer,' and he said, 'Well, take a bottle,' and I said, 'Whichever way you prefer, *I have no choice,*' and he said, 'Give us two Schlitz,' and they set two bottles out on the bar, and glasses, *and I had drank part of the glass, and Williamson looked up and said, 'Do you detect any difference in that beer?'* and I said, 'It don't taste exactly right,' and he said, 'Do you think this is Schlitz beer?' and I looked at the bottle and said, 'Why, it is not Schlitz beer.'

"Q. *How did you know it was not Schlitz beer?*

"A. *I saw the label on it.*

"Q. *You had not seen the label before that?*

"A. *I had not noticed it particularly, because I would naturally think it was Schlitz beer.*

"Q. As soon as you noticed it you saw and stated that it was not Schlitz beer?

"A. Yes, sir.

"Q. Did you have any difficulty at all, when you noticed it, in telling whether or not it was Schlitz beer?

"A. There was a small difference.

"Q. Could you tell at once that it was not Schlitz beer—I mean, look at the label and tell it was not Schlitz beer?

"A. *Yes, sir, sure thing.*

"Q. I understood you to say that up to that time you had not paid any attention to the label?

"A. Yes, sir.

"Q. That is true?
"A. Yes, sir.
"Q. That you had not paid any attention to the label at all up to the time you glanced at it?
"A. Yes, sir." (Tr., 66, 67.)

McIntire also testified that on one occasion he bought six bottles of beer; that he was not positive whether he called for Schlitz beer or not; that he is not positive, but he thinks there were two bottles of Southern Select put in for Schlitz. (Tr., 66.)

On cross-examination, however, he testified that he did not know anything about what beer it was, except what he was subsequently told by the man for whom he had bought the beer. (Tr., 67.)

George Barringer, at the time engaged as a bartender at the Interurban Buffet, testified that while he was employed as a bartender at the Bender bar he had substituted Southern Select for Schlitz beer, with the labels on the bottles. That on several occasions the customer detected the substitution. That substitutions were generally made in a rush, that some of the customers detected the substitution, and some did not, the proportion being about two out of ten or two out of twenty. (Tr., 72.) That when he first went to the Bender Hotel bar he inquired of the porter what the signs were; they were that if he wanted two bottles of Southern Select, and the man called for that, he would say "Two Schlitz"; if he wanted two bottles of Schlitz, he would say, "Two bottles Schlitz." ( Tr., 69.)

Westley Johnson, the negro porter who worked with Barringer, testified that when a gentleman not familiar with the label called for a bottle of Schlitz he (the bartender) would say, "Bring me a bottle," and that meant

a bottle of Southern Select. That they did this as often as they could put it by. That when he wanted to substitute Southern Select for Schlitz, and the bartender did not give him a sign, he would holler, "Bottle." That they were able to put this by very frequently. That he was given his instructions by Charlie Zeller, the head bartender. That lots of times customers would call for Schlitz, and Southern Select was put out, and that they would notice the label, and then they would drink it, but they would say that they called for Schlitz, just the same. About one man in ten noticed the difference. (Tr., 70, 71.) Asked if a man that did get a good look at the label drank it for Schlitz, the witnesss replied that he had seen men who had drunk the beer half up think he had drunk Schlitz, that the reason he had not noticed it before that time was because he did not pay any attention to it until he had drunk half of it before noticing that it was Southern Select. (Tr., 71.)

Examined by the court, the witness testified:

> "Q. Sometimes men come into the Bender bar that would not be able to read the label on a beer bottle?
>
> "A. Yes, sir, men come on (in) and are so drunk they pay no attention, and if they ask for bottle Schlitz you could give him a bottle of Southern Select or *anything*.
>
> "Q. There was no trouble in imposing on a drunk man when he asked for a bottle of beer?
>
> "A. No, sir, he did not pay much attention to it." (Tr., 72.)

On re-cross-examination Johnson, in giving the signals used between him and Barringer, testified to an entirely different lot of signals from those which Barringer claimed to have used. (Tr., 73.)

John Nelson, a porter in the saloon of W. F. Blum, Jr., of Temple, testified that in the saloon in which he worked he frequently made a mistake, and hurriedly picked up Southern Select for Schlitz. That in order to avoid these mistakes the saloon man now handled Southern Select in *white bottles*. (Tr., 73.)

On cross-examination he testified that one could not be mistaken if he looked at the bottle without being in a rush. That he had trouble in telling the beers apart in a rush. That sometimes customers turned the bottle back, and told him he made a mistake. Sometimes they drink it and say nothing; sometimes they kick and send it back, and say, "I ordered Schlitz." That the way they find it was not Schlitz was by reading the label. That *when they get a chance to look at the label, and do look at it*, they can tell that it is Southern Select. That after a customer looks at the label he would not be deceived. That they make a mistake when they do not look at the label. That the saloon in which he worked did not sell any other beer in brown bottles except Southern Select. (Tr., 73.)

That he did not recall any instances where a customer was ever deceived who had looked at the label that was on the bottle. (Tr., 73.)

That in handling Southern Select for Schlitz he would *rub the label off* in the water, and one could not tell from the top whether it was Schlitz or Southern Select. (Tr., 74.)

J. R. Callahan, of Beaumont, agent for petitioner's beer at that point, testified that in the latter part of August or first of September, 1913, a porter on a trade excursion served Southern Select beer, thinking he was serving Schlitz. (Tr., 75.) He also testified that he and

a number of friends going from Houston to Beaumont stopped at Lang's Oyster Parlor, in Houston, on one occasion, and ordered seven bottles of Schlitz beer, that seven bottles of Southern Select were served, that none of the beer was drunk, but that the mistake was detected by someone of his party at soon as the beer was brought in. (Tr., 75, 76.)

C. L. Fisher, a saloon keeper at Beaumont, testified that he had been in business at Beaumont for himself a couple of years, and he had been keeping bar about five months since that time; that all the while he was in business he was serving Southern Select when Schlitz beer was called for; that he got by with it pretty regularly, once in a while someone mentioned it. (Tr., 76.)

He also testified that, from his experience of twenty years in the saloon business, after a man takes four or five bottles, he don't know what kind he is drinking; that that was the way he got by with some of it, but mostly he got by when the man did not exactly look at the label; that when a man has drunk three or four bottles of beer you can hand him almost anything in a bottle. (Tr., 77.)

J. A. Taylor, clerk at Anderson's soda fountain, testified that on one occasion at the Bender bar he had called for Schlitz and had been served Southern Select; that when he first tasted it he shoved it aside and said that he ordered Schlitz; that after he tasted it he noticed the label, and saw that it was Southern Select. (Tr., 78.)

He also testified that at another time and a different place he called for Schlitz and was served with a bottle of beer that did not taste like Schlitz; that he noticed that the label was partly torn off, and he examined it and saw

the letters "HOUS"; that after he tasted it he looked to be sure that it was not Schlitz. (Tr., 78.)

On cross-examination he testified as follows:

"Q. You glanced at the bottle, your attention having been called to it by a difference in the taste?

"A. *I did not glance at the bottle,* I just barely tasted it and found it was not Schlitz, and set it down.

"Q. *Then you looked at the label?*

"A. Yes, sir." (Tr., 79.)

On cross-examination he testified that he had been patronizing the Bender bar pretty regularly for about four years, and that George Barringer was the only one that ever attempted to make a substitution on him.

He also testified that the attempt to substitute Southern Select for Schlitz occurred to him only one time at the Bender bar. (Tr., 78.)

L. Anderson, manager of the Brazos bar, and part owner of the Brazos Hotel, testified that on one occasion he was in the Macatee bar and ordered a bottle of Southern Select; that he was served a bottle of beer and thought it was Schlitz, and called the bartender's attention thereto, whereupon the bartender informed him that the beer served was Southern Select; that he then read the label, and saw that the bartender was correct. That this was the first time he had ever seen Southern Select in the new bottles, and that he did not know before then that it was put up in brown bottles. (Tr., 79.)

On cross-examination he was asked this question and made this answer:

"Q. Were you drinking then?

"A. *Manifestly.*"

J. T. Booth testified that he lived in Beaumont; that on one occasion he, with Mr. Callahan and Mr. Swenson, were at Lang's Oyster Parlor with a party, and an order was given for Schlitz beer; that Southern Select was served; that he thought Schlitz beer had been served until he heard someone remark about not having the beer that was ordered, and that he then examined the label and saw that it was not Schlitz. (Tr., 80.)

On cross-examination he testified that he paid absolutely no attention to the order or the tray until the conversation came up about not having gotten what they ordered. (Tr., 80.)

E. H. Tomlinson, a saloon keeper at Stafford, in taking beer out of the ice box, two or three times picked up Southern Select for Schlitz; that the clerk did not discover his mistake until he, Tomlinson, called his attention to it; that at that time the beer had been set out on the counter, and the customer said, "Let it go." He also testified that he did not have any difficulty in distinguishing the bottles himself, except in the ice box; that then he would have to turn it over and see whether it was Southern Select or Schlitz; that none of his customers were ever deceived. That two or three of his customers remarked that deception could be practiced easily, that when they did not look at it they might believe it was Schlitz "if they did not look at the label." (Tr., 80, 81.)

W. Guse testified that he was in the saloon business at Bastrop; that in November, a year ago, during the Houston Carnival, he was in the Rice Hotel bar, when, to quote his own language, "I saw two gentlemen walk up and ask for two bottles of Schlitz beer, and the bartender reached down and got two bottles of Southern Select, *and as he took the bottles up he rubbed the labels off, and I am*

*positive they were Southern Select; I know it when I see it.*" (Tr., 82.)

Mr. Kronshage, attorney for the petitioner, testified that on one occasion he was in the Rice Hotel bar when he heard three men come up, and each gave an order for Schlitz beer. That a bottle of Southern Select was served to one of the gentlemen, and Schlitz was served to each of the other two; that the men were engaged in conversation; that he called the party's attention to the fact that he had been served Southern Select instead of Schlitz, and all three of them expressed some surprise, and handed the bottle around. (Tr., 83, 84.)

Peter Breit testified (by deposition) that he had been running a saloon for a year and a half at Pharr, and six months at Danna; that he sold Schlitz, Southern Select and Alamo beer. (Direct Interrogatories 1 and 3.)

That as often as he had a chance he substituted Southern Select for Schlitz, because he was making two and one-half cents more per bottle by so doing. (Tr., 89.)

That in a rush one could sell Southern Select for Schlitz, and can sell it to men who can't read; that it looks so much alike after taking off the top label; that you couldn't do it unless you take off the top label; that they don't look at the label. (Tr., 91.)

J. E. Ellis testified by oral deposition that he had tended bar at Brownsville, and had himself operated a saloon at Matamoras. (Tr., 85.)

That he had served Southern Select to customers calling for Schlitz beer; that he served Alamo or Southern Select to customers who had been drinking; that when a customer came in who had not been drinking, and called for a bottle of Schlitz, that he would first give them a bottle of Schlitz. (Tr., 85.)

The witness further testified that he cooled his beer in ice water, and when customers came in in a rush he would strip the labels off when serving it. (Tr., 85.)

Asked if he could substitute a bottle of Southern Select for Schlitz, the witness replied that he could after the customer had drunk four bottles of Schlitz.

Asked if he had a brown bottle with a white label, whether or not he would be able to substitute it for Schlitz, the witness replied that he could by laying the bottle on cracked ice and permitting the label to fall off.

The witness further testified that he kept a large quantity of Southern Select, and a small quantity of Schlitz, for the reason that he had among the higher officers some swell customers that liked Schlitz beer; that often when these parties drink Southern Select, the bartender would jerk off the label. (Tr., 86.)

On cross-examination the witness testified that he had substituted Southern Select for Schlitz without shucking the label, first, to people who could not read or write; second, by sending out to his customers at tables beer in glasses, keeping the bottles at the bar; and, third, by sending out the beer in bottles with the labels on after his customers had had numerous drinks. That he would not have risked doing this with the first bottle. (Tr., 86, 87.)

That he had substituted Schober, Southern Select and Alamo beer for Schlitz; that after the first bottle he could serve any other kind of beer in brown bottle for Schlitz. (Tr., 87.)

We ask the court's indulgence for reviewing, somewhat at length as we have, the testimony of petitioner's witnesses offered to show cases of substitution. We

have endeavored faithfully to set out the testimony of every witness offered by petitioner to prove substitution, so that we might furnish the court a convenient digest of all of the testimony offered by the petitioner on this point.

Of these witnesses four testified to a continued course of substitution; they are George Barringer, C. L. Fisher, Peter Breit, and J. E. Ellis, a quartette, who, from their own admissions, are utterly unworthy of belief. Each is convicted by his own testimony of perfect willingness to perpetrate a fraud for remarkably small compensation.

Barringer testified to repeated substitutes at the Bender Hotel bar. He is directly impeached by the conflict in his testimony and that of Westley Johnson, the porter, as to the signs used between them in perpetrating the deception. He is likewise impeached by the testimony of Chas. Zeller to the effect that no such substitutions were practiced at the bar under his management; that he em ployed the bartenders and porters, among them Barringer and Westley Johnson; that he had had charge of the bar since it first opened; that he had never given instructions to substitute one beer for the other, but that his instructions were always to give every man what he called for.

Barringer is further impeached by the fact that the Bender Hotel Bar is owned and run by one of the owners of the hotel itself; that the bar caters to what may be termed the better class of trade, and that a practice such as Barringer referred to would work a serious injury to the business.

There are three other circumstances worth remembering in passing on the value of Barringer's testimony.

First, he claimed to have gotten this custom to substitute one beer for another from a negro porter, not the manager.

Second, at the time of his testimony he had a business relation with, if not a direct employment from, the local agent for Schlitz beer. Zeller testified that he was at one time manager of the Schlitz Bar, on Main Street, that he was employed by Mr. Japhet, the Houston agent for Schlitz beer, that he was succeeded as manager of the Schlitz Bar by Louie Rechter. That Rechter is now manager of the Interurban Buffet, where Barringer went for employment, at an increase in salary, upon leaving the Bender. If Barringer is willing to testify that he fraudulently substituted one beer for another to hold an eighty dollar ($80.00) job, it is not unreasonable to believe that he would swear falsely if he believed that such testimony would be pleasing to a man giving him a one-hundred dollar ($100.00) job. Petitioner offered no testimony tending to show that Mr. Japhet did not have a financial interest in the Interurban Buffet.

Third, although Barringer claimed that a regular practice of substituting Southern Select for Schlitz beer obtained in the Bender bar, young Taylor, the soda fountain clerk at Anderson drug store, testified that he had been a customer of the bar for four years, was a Schlitz drinker, and could detect the difference by taste between Schlitz and Southern Select, still only one time had he been served with Southern Select when he called for Schlitz beer.

Fisher did not handle Schlitz beer at all. His activities seemed to be limited to supplying what he had when something was called for that he did not have in stock. Even

he emphasizes the fact that it is much easier to make the substitution after a customer has had several drinks than it is to make a substitution with the first bottle.

Peter Breit, the peripatetic barkeeper from Chicago, Pharr and Danna, not only testified to substituting Southern Select with labels on for Schlitz, but also testified that he handled black bottles without any labels, which he also sold for Schlitz; that he had them put up special orders for that purpose.

It does not occur to us that the testimony of a man who brands himself as willing to swindle a customer for two and one-half cents per bottle will be taken to outweigh the court's own conclusion as to the similarity of the disputed labels themselves.

While Ellis' testimony brands him as altogether unreliable, still if there is any truth in what he says, his testimony hurts rather than helps the petitioner's case. By far the greater part of the substitutions to which he testifies were accomplished by stripping the label from the bottle. Another way he had of doing was to serve the beer in glasses to customers seated at tables, keeping the bottles at the bar. This evidence, it seems to us, fortifies respondent's contention that the labels which it is using sufficiently distinguish its product from that of the petitioner whenever the package is delivered to the customer in the condition in which it is put out by the respondent. The petitioner can have no just quarrel with the respondent if saloon keepers strip off the labels and rely on the brown bottle to work the deception.

Frank Williamson is another witness whose testimony gives the impression that he is not worthy of belief. True, he testified to one case where Schlitz beer was ordered

and Southern Select furnished. On cross-examination, however, he reluctantly admitted that on this and several other trips he made he had been looking out for evidence at the request of Mr. Swenson, a representative of petitioner in this territory; that he had made several trips, and that he had arranged for the attendance of McIntire, Buesing and Ellis as witnesses. Of course, there is nothing wrong with Williamson performing this service for petitioner, but his very apparent lack of frankness and hesitancy in giving the court the details of this litigation put a question mark after his testimony. Not only so, but he testified that he had been performing the services referred to, and making trips for petitioner, without compensation for his time. This is rather unusual in a man of his type in dealing with a matter of this kind. The apparently honest confusion testified to by Buesing Nelson and Tomlinson seems to have been fairly attributable to the use of the brown bottle, and the testimony of each is entirely consistent with a finding that any purchaser buying with ordinary care would promptly detect the difference in labels.

Selvage and Anderson each testified to having been misled one time, when they first saw Southern Select put out in brown bottles. Prior to that time they had always known it to be put out in a white bottle, with a white label. The label on the bottle testified about by Selvage and Anderson, as the record in this case shows, is not the label now used by respondent and involved in this suit. Not only so, but Selvage, when shown one of the labels now in use, testified that he would not be deceived by that label.

McIntire testified to a substitution when he was the

guest of Williamson, the gentleman who at that time was making unofficial investigation for the petitioner. In connection with McIntire's testimony, it is interesting to know that he called for beer without naming the brand, and in fact had no preference.

The incident testified to by Callahan and oBoth standing alone as it does, does not strongly support petitioner's contention. It seems that the order for Schlitz was given by the party to a waiter who in turn went to an adjoining bar to make the purchase. Whether the order was correctly transmitted, or whether the barkeeper purposely attempted to substitute the beer not ordered, does not appear from the evidence, but these witnesses do make it clear that none of their party was deceived, because attention to the difference was detected promptly after they were served. Of course, they were able to make the distinction by the labels only. Certainly the labels in that case did perform their mission, and notified intending purchasers that the beer furnished was the product of this respondent.

Taylor testified to two instances when he was served Southern Select and called for Schlitz. He detected the substitution first by the taste, and immediately thereafter by an examination of the label.

Mr. Guse testified to one case of substitution at the Rice Hotel bar. A customer, he says, called for Schlitz, the barkeeper slipped the label, and Mr. Guse detected that the beer furnished was Southern Select. This cannot help the petitioner's case, as the barkeeper apparently recognized that he had to get rid of the label to work the substitution, and the two labels are sufficiently distinct that Mr. Guse satisfied himself by a bare glance,

such as he had opportunity to make while the barkeeper was slipping the label, that it was a label of Select.

The two incidents testified to by Buesing and Bernd were apparently efforts to trap an employe of the Houston Ice & Brewing Company, and a loyal drinker of its product. They seem to have occurred after the filing of this suit, and may have been induced by the talk which arose by reason thereof. In any event, the proof seems to be undisputed that Bernd promptly detected the difference, even before he tasted the beer.

This disposes, we think, of all of the petitioner's testimony on cases of actual substitution. It is true that the record shows a few isolated cases of genuine confusion, but the law does not require respondent to put out a package so distinctive that a heedless or careless buyer could never be deceived. It does not require the respondent to put out a package so distinctive that one cannot be deceived, who, in the language of the court in Coca-Cola Co. v. Glee-Nol Bottling Co., 221 Fed., 61, "is so utterly unobservant when he gets and consumes such a beverage that deception might with equal success be practiced upon him, whether there is, or is not, a resemblance in any identifying particular between what he calls for and what he gets."

Such a requirement would drive respondent out of business entirely.

### 8. Great Weight Should Be Attached to the Conclusions of the Trial Court on the Conflicting Evidence.

The trial judge heard the testimony, and found in support of respondent's contention. The judge of that court had an opportunity to see the witnesses and to observe

their manner of testifying. No written record can fairly reflect these occurrences in the court room.

In DeLaval Sep. Co. v. Iowa Co., 194 Fed., 423, which was for infringement of a patent, the court, in referring to the conclusions on the question of fact reached by the trial judge, said:

> "When the chancellor has considered conflicting evidence, and made his finding and decree thereon, they must be taken to be presumptively right; and unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, they must be permitted to stand."

To the same effect, and involving a similar question, is the case of Tilghman v. Proctor, 125 U. S., 136.

The Circuit Court of Appeals will not disturb the conclusion of a trial judge on disputed questions of fact, where the hearing was on oral testimony, except for cogent reasons, such as a palpable mistake or misconception of the decided weight of the evidence. Barton Bros. v. Texas Produce Co., 135 Fed., 355; Pugh v. Snodgrass, 209 Fed., 325; Carey v. Donohue, 209 Fed., 328; United States v. Marshall, 210 Fed., 295.

In the case last cited the suit was to cancel a patent, The court said:

> "On this appeal the controversy is purely one of fact. * * * To secure a reversal upon such a basis as that just mentioned the appellant must convince us not only that the trial court may have been wrong, but that it was manifestly wrong. There must, under the holdings of this court, have been an 'obvious error' of law or a 'serious mistake' in dealing with the facts.
>
> "The error must be 'clear and palpable.' The conclusion of the trial court is 'presumptively right.'

> • • • While no doubt the circumstance that the District Judge personally heard the witnesses tends to strengthen the presumption in favor of his conclusions, the fact that he did not hear such witnesses, but that the proofs before him were entirely by deposition or upon examiner's report, does not destroy the presumption. Such still exists in favor of his conclusion. To hold otherwise would in effect be to make this the court of first instance. The District Court is not in such matters a mere conduit. It, not this court, is the trial court. Our functions are simply to guard against manifest error on its part, and this is true whether such arises upon hearing witnesses or upon reading a record."

In American Rotary Valve Co. v. Moorehead, 226 Fed., 202, the court held:

> "Under the new equity rules, as well as under the old rules, the reviewing court has the right and the duty of trying the questions of fact *de novo;* but the findings of fact below are not to be disturbed unless it clearly appears that the trial court has either misapprehended the evidence or has gone against the clear weight thereof."

This court, in a comparatively recent case (United States v. United Shoe Machinery Co., 247 U. S., 32, 41), uses this language:

> "We are therefore admonished at once of the complexity of the case and the maze of mechanical technicalities into which we should be plunged in estimating the evidence if we had not the guidance of the opinions of the judges of the trial court. The court found, as we have said, that the companies were not in competition at the time of their union in the United Company, and based the finding not only upon the testimony of witnesses, but the uses of the machines of the respective companies and their methods of operation. The testimony was con-

flicting, it is true, and different judgments might be formed upon it, but from an examination of the record we cannot pronounce that of the trial court to be wrong. Indeed, it seems to us to be supported by the better reason. We should risk misunderstanding and error if we should attempt to pick out that which makes against it and disregard that which makes for it, and judge of witnesses from their reported words, as against their living presence, the advantage which the trial court had."

### 9. An Inspection of the Labels Themselves Leaves Nothing to Be Said to Show That There Is No Unfair Competition.

As said by Lord Russell: "One must be guided very largely by the judgment one forms from the use of his own eyesight." (Liebig's Extract of Meat Co. v. Chemist's Co-operative Society, Rep. of Patent, Design and Trade Mark Cases, Vol. 12, pp. 736, 738.)

Associate Justice Brewer, when he was sitting as Circuit Judge for the Eighth Circuit, put it this way:

> "Elaborate description of points of resemblance or those of difference are, taken by themselves, alone, always unsatisfactory. The eye, at a glance, takes in the whole of one exhibit and the whole of another; and the comparison thus made of the two is surest, and the only satisfactory way of satisfying the judgment as to the existence of the alleged deceptive imitation."

And, again, in the same case:

> "We shall not stop to review the testimony which is offered upon the question whether the resemblances between the two packages and labels were calculated to mislead, or whether in fact they did operate to mislead. It is enough to say that there was testimony on both sides of these questions, and, perhaps, looking

at the matter of testimony alone, it might be difficult to say on which was the preponderance, *but such testimony*, giving it all the weight it is entitled to, *does not disturb the conclusions which we have reached from an inspection of the packages and labels themselves. We cannot surrender our own judgment in this matter because others may be of a different opinion, or because it happens, in isolated instances, that some purchaser was so careless as not to detect the differences.* It may well be that where many sales were made some individuals, not particularly attentive, may have purchased the defendant's supposing they were purchasing the plaintiff's package. Such things will happen in the ordinary course of business, no matter how great the differences, and the fact that they do happen, while it is not to be ignored, is not to outweigh the evidence which comes from a personal inspection of the packages and labels." (Lorillard v. Peper, 86 Fed., 956, 960.)

We appeal, therefore, to your Honors' own judgment on an inspection of the labels themselves to support the claim of respondent that there is no such similarity between the two labels as will result in confusion by anyone who paid any attention at all to the label. The labels appear on the first pages of this brief.

### 10. The Authorities Abundantly Support the Position of Respondent of No Unfair Competition.

Unfair competition may be defined as passing off, or attempting to pass off, on the public the goods of one man as being the goods of another. It consists essentially in the conduct of the trade or business in such a manner that there is an expressed or implied representation that the goods and business of one man are the goods and business of another.

As said by Chief Justice Fuller, in Howe Scale Company v. Wycoff, 198 U. S., 140:

> "The essence of the wrong in unfair competition consists of the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

Justice Sanborn, of the Eighth Circuit, in Kann v. Diamond Steel Co., 89 Fed., 706, puts it this way:

> "The deceit or probable deceit of the purchaser so that he buys or probably will buy the articles of one manufacturer or vendor in the belief that they are those of another, is a *sine qua non* of such a suit, because everyone has the undoubted right to sell his own goods, or goods of his own manufacture as such, however much such sales may damage or injure the business of another. The diminution, injury, even the destruction, of the business of a competitor by such sales is not an injury in the legal sense, and will warrant no relief, because it is the effect of the exercise of an unquestioned right. In cases to restrain unfair competition by assimilation of trade and dress, it is only when the likeness deceives or will probably deceive the buyers into the belief that the goods of one manufacturer or vendor are those of another, and only to the extent that it thus deceives that any legal injury, or that a court of equity may grant relief."

E. Regensbury & Sons Co. v. Juan F. Portuondo Cigar Mfg. Co., 142 Fed., 160, is a case passing on the color of the label. The opinion comes from the Circuit Court of Appeals for the Third Circuit, and is by Justice Gray.

The complainant, engaged in the manufacture of cigars, sought to restrain the defendant from using a certain kind of band around its cigars. Both bands were dark

brown, differing very little from the color of the cigar wrapper, and the lettering on both was white. In the opinion of the Circuit Court the opinion of the trial court is set out at length; among other things, the trial judge said:

> "The trade mark to which the combination lays claim is a band described in the patent, to which is added the brown color and the white lettering displayed thereon. The mark is not registered, and its common law validity need not, I think, be discussed. Assuming that the field was clear for its adoption, and conceding that it was put into use in June, 1900, while the defendant's band was adopted in 1903, I am unable to see sufficient evidence of infringement, even if the complainant's mark be given its widest lawful scope. *Certainly the color alone could not be appropriated by the complainant as a trade mark,* nor the shape alone, nor the material alone; and even the combination of these three elements could not make a valid trade make, because *neither singly nor in combination do they point to the complainant as the source from which the goods are derived. Something more is needed to supply this defect, and this is found, if at all, in the lettering upon the band.* But, after this is added, and assuming that a valid trade mark has now been produced by combining the four elements referred to, it remains to inquire whether the defendant's band infringes; and upon this point I think that an inspection, which need not be minute, shows plainly that the differences are apparent to an ordinary, careful observer. The defendant's band contains nothing but a name in script, evidently imitating an autograph, while the complainant's band contains a firm name in block letters, the word 'Trade mark Pat. Dec., 1902,' and the initials 'E. R. & S.' *It is likely enough that a near-sighted man, or a man with impaired vision, unaided by glasses, or a man in so much of a hurry as to be unwilling to stop for a careful look, might mistake*

*one band for the other, but these classes may be disregarded in applying the test of similarity. Certainly an ordinarily intelligent man, able to see and to read, and willing to take a few seconds' time to examine the two bands, would inevitably discover that one of the banded cigars was made by the complainant, and the other by the defendant.* And if this is so, it is clear that the charge of infringement has not been established. The complainant's evidence concerning confusion of the two bands is too slight to support the charge.

"The averment of unfair competition has still less to support it. The defendant's band was selected with no reference to the complainant's, and with no intention to imitate it, even remotely. In point of fact, as already stated, it does not resemble it so closely as to deceive a person of ordinary intelligence and powers of observation, and so far as they have two features in common—a brown color and white lettering—the resemblance was not intended, and was not adopted, with any design upon the complainant's trade.

"A decree may be entered dismissing the bill, at the cost of the complainant." (Page 162, 163.)

Commenting on the foregoing, Judge Gray said:

"There is little to add to the findings of fact and conclusions of law set forth in this opinion. It is perfectly clear that complainant's claim that they are entitled to the exclusive use, as a trade mark, of a cigar band made of brown colored paper, of a peculiar shape, by being wider at one end than at the other and lettered in white letters, as illustrated in the specimen attached to their bill, cannot be maintained. *Such appropriation, if sustained, would extend to any brown band of about the width shown by complainant's specimen, on which the true source or origin of manufacture or ownership is printed in white letters.* No claim is made to the distinguishing feature of the name 'E. Regensburg & Sons,' printed

on the band of complainant. The defendant has used a narrow brown band with the name 'Juan F. Portuondo' in white letters. The white lettering on complainants' band are block letters, while those on defendant's are script. There is also other lettering on complainant's band, while there is no other lettering on defendant's band, as pointed out by the learned judge of the court below. These bands are really labels upon the cigars, containing the name of the manufacturer. It *is elementary that size and color of label cannot be appropriated as a trade mark.* The principles of morality underlying the law both of trade mark and unfair competition, do not contenance so absurd a proposition as that a person may not designate the origin or ownership of the goods he sells, by printing his name upon a label attached to them. In this case there is nothing peculiar in the form of the label. It is a straight band, of a width suitable to hold the name, which is printed in white letters because the band is dark in color. *The distinguishing thing about the label is the name, and this sufficiently distinguishes the defendant's from the complainant's label.* That one end is made wider than the other is immaterial, as the ends do not show as the cigars are laid in the box. Any person turning the cigar over and inspecting it closely enough to observe this peculiarity in the shape of one end could hardly fail to notice the name of the label. The label, then, of both complainant and defendant is of the usual and obviously convenient shape for the purpose of displaying the name placed upon it. There is no other mode of labeling a cigar that is as convenient or so obvious as a straight, plain band of suitable width to encircle a cigar and hold the name of the owner or producer. A straight, white band of suitable width, with the name of the maker of the cigar in black lettering, might as well be claimed as a trade mark. *No such appropriation of obvious and simple methods of advertising one's name on his productions can be appropriated.*" (Pages 163, 164.)

Every phase of the issue in the case at bar has been before the courts from time to time. For the court's convenience, we copy largely from the opinions in the cases to which we wish to refer.

P. Lorillard Co. v. Peper, 86 Fed., 956, before Justices Brewer, Sanborn and Riner—Eighth Circuit—opinion by Justice Brewer:

> "We think, therefore, that we are called upon to inquire whether defendant's package, with either the earlier or the later label, was in itself a deceptive imitation of plaintiff's package and label, or so used as to create that unfair and illegal competition which the law denounces, and for which it affords compensation. If the earlier label was not an unfair imitation, the later certainly was not. The change was in the direction of difference, and not in that of resemblance. So we shall address our inquiry to the former. That there are some matters of resemblance is obvious, and it is equally obvious that there are essential and marked differences, and the inquiry in these cases is not fully answered by calling attention to either the several matters of resemblance or those of difference. The question is whether, taking the defendant's package and label as a whole, it so far copies or resembles the plaintiff's package and label that a person of ordinary intelligence would be misled into buying the one supposing that he was buying the other. And in such a case, as said by Lord Russell in Liebig's Extract of Meat Co. v. Chemist's Co-operative Soc., decided by the British Court of Appeals November 20, 1896, and reported in the Reports of Patent Design and Trade Mark Cases (Volume 12, pp. 736, 738), 'one must be guided very largely by the judgment one forms from the use of one's own eyesight.' Elaborate descriptions of the points of resemblance or those of difference are, taken by themselves alone, always unsatisfactory. The eye, at a glance, takes in the whole of one exhibit and the whole of another; and the comparison

thus made of the two is the surest, and the only satisfactory way of satisfying the judgment as to the existence of the alleged deceptive imitation. Here are the two labels, omitting the coloring. (Labels are shown.)

"Now, whatever minor points of resemblance may be pointed out between these two labels, it seems to us the differences are so pronounced that there is no reasonable ground to apprehend that any man of ordinary intelligence would be misled. The two principal ways by which an article is distinguished in trade are, first, *the name of the manufacturer;* second, *the descriptive name.* It is said that the plaintiff had acquired a reputation which attached to all of its manufactures, and that Lorillard's tobacco, particularly in the district where the competition arose between plaintiff and defendant, was generally known, and known as a superior article. Concede this, and it appears in the most marked way upon the defendant's label that it is not Lorillard's tobacco that he is selling. The name 'Pepers' is in the largest letters, and the most conspicuous place. No one who was looking for Lorillard's tobacco could for a moment be deceived into the belief that this was that tobacco. There is no similarity between the names. Neither the number of syllables nor the number of letters are the same, and there is only one letter in the two names alike. The other principal mode of identification is *the name under which the article passes,* and here the difference between the two names (though perhaps not so pronounced) is still marked and obvious. 'Tuberose' and 'True Smoke,' when spoken, do not sound alike, do not suggest the same idea; and while, considering the number of letters, and the letters themselves, there is more of similarity than between the names of the manufacturers, yet the contrast between the two is apparent at a glance. So that in the *two important features—those by which a purchaser identifies that which he wishes to purchase—the differences are so radical and obvious that it is difficult to perceive how*

*anyone could be misled.* Beyond these significant matters it may be noticed that the *plaintiff's label is a narrow one,* 1½ inches in width, circling around the center of the package; the *defendant's a broad one,* 2¾ *inches wide,* and covering nearly the whole length of the package.

"We shall not stop to review the testimony which is offered upon the question whether the resemblance between the two packages and labels were calculated to mislead, or whether in fact they did operate to mislead. It is enough to say that there was testimony on both sides of these quetions, and, perhaps, looking at the matter of testimony alone, it might be difficult to say on which was the preponderance; *but such testimony,* giving it all the weight that it is entitled to, *does not disturb the conclusions which we have reached from an inspection of the packages and labels themselves. We cannot surrender our own judgment in this matter because others may be of a different opinion, or because it happens, in isolated instances, that some purchaser was so careless as not to detect the differences.* It may well be that, where many sales were made, some individuals, not particularly attentive, may have purchased the defendant's, supposing they were purchasing the plaintiff's package. Such things will happen in the ordinary course of business, no matter how great the differences; and the fact that they do happen, while it is not to be ignored, is not to outweigh the evidence which comes from a personal inspection of the packages and labels." (Page 960.)

"But, * * * it must be noticed that the form of the package and colored stripes were not new in defendant's business, so in these respects he was not simply imitating the plaintiff. Both the form and color of the stripes were in frequent use among manufacturers, and the plaintiff had no special rights in respect to either. It has doubtless been found by experience that a cylindrical package is more convenient for slipping into and taking out of a pocket, and therefore they who use tobacco prefer packages in

that form. And, as between a white and a striped package, the variety of color appeals to the eye, and, other things being equal, the purchaser is apt to take the latter. But these are matters of convenience and attraction in common use, and which any manufacturer is at liberty to adopt, and in adopting which he trespasses not the slightest upon the rights of others." (pp. 961-2.)

Kann et al. v. Diamond Steel Co. et al., 89 Fed., 706, before Justices Sanborn, Thayer and Shiras—Eighth Circuit—opinion by Justice Sanborn:

"This is an appeal from a decree which dismissed a suit in equity that had been brought to restrain the appellees from imitating the trade mark of the appellant, and from selling their goods marked with that trade mark or any simulation of it. *Every suit of this character is founded on the fact that the action, or the proposed action, of the defendant has deceived, or is calculated to deceive, ordinary purchasers buying with usual care, so that they have purchased, or will probably purchase, the goods of the defendant under the mistaken belief that they are those of the complainant, to the serious damage of the latter.* The *deceit*, or probable deceit, of the *ordinary purchaser* to such an extent that he buys, or will probably buy, the property of one manufacturer or vendor in the belief that they are those of another, is a *sine qua non* of the maintenance of such a suit, because everyone has the undoubted right to sell his own gods, or goods of his own manufacture, as such, however much such sales may diminish or injure the business of competitors. Mr. Justice Duer, in the leading case of Manufacturing Co. v. Spear, well stated this rule in these words: 'At present it is sufficient to say that, in all cases where a trade mark is imitation, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, *and it is only when this false representation is directly or indirectly made,*

*and only to the extent to which it is made, that the party who appeals to the justice of the court can have a title to relief.*" Manufacturing Co. v. Spear, 2 Sandf., 599, 606; Canal Co. v. Clark, 13 Wall., 311, 322; Gorham Co. v. White, 14 Wall., 511, 528; McLean v. Fleming, 96 U. S., 245, 255, 256; N. K. Fairbanks v. R. W. Bell Mfg. Co., 23 C. C. A., 554, 77 Fed., 869, 876.

"There is no evidence in the record that any purchaser was ever actually deceived so that he purchased the German product in the belief that it was the abradant made by the appellant. The words and symbols upon the various packages of these abradants sold by the appellant and the appellees respectively, necessarily varied to some extent with the size and shape of the packages, but these are fair samples of those used in the trade by the parties to this suit." (page 709.)

"The burden was on the appellant to show that the use of the symbol and words which marked the German product were calculated to deceive ordinary purchasers, and to create confusion in the trade. It was open to it to do this by evidence that the use had actually done so, or by the ocular demonstration of a comparison of the symbols and words which marked the packages in which the two products were offered for sale. It produced no proof of actual deception, and thus left the question whether or not the dress in which the German product is clothed is calculated to deceive the ordinary purchaser to the arbitrament of the eyes. When they are turned upon the two trade marks, either simultaneously or successively, the general impression is one of difference and dissimilarity." (p. 710.)

"However this may be, when all the words and symbols used by these litigants upon their respective packages as they are actually offered for sale to the trade are considered, all possibility of their confu sion, or of the mistake of the one for the other, seems to disappear. *The name of the product, the name of its manufacturer,* and the *place of its manufacture,*

are certainly three of the most distinctive characteristics by which one article of commerce may be distinguished from another. All these are printed upon the packages of this product around the respective symbols of these competitors. The name of the material branded upon appellant's packages is either 'Crushed Steel' or 'Steel Emery'; on the appellees' it is 'Diamond Steel.' The name of the manufacturer printed on the appellant's package is 'Pittsburgh Crushed-Steel Company, Limited,' and on the appellees' it is 'Diamant-stahl Werk'; and the place of manufacture printed on the appellant's packages is 'Pittsburgh, Pa., U. S. A.,' while on the appellees' it is 'Alchemitz.' When it is considered that *these differences of symbols, of names of the articles, of names of the manufacturers, and of the places of manufacture,* all appear on the face of the respective packages as they are offered for sale, and that they are all emphasized by the use of different letters and a different arrangement of words, while the only hint of similarity is the fact that a diamond-shaped figure and the picture of a radiant diamond may both be called a diamond, the logical inference confirms the ocular demonstration which the sight of the two trade marks makes, and leads irrisistibly to the conclusion that the dress in which the German product is clothed is not calculated to give a false impression to the public, or to deceive any purchaser who exercises any degree of care in the selection of his goods." (p. 711.)

"A considerable part of the evidence and argument for the appellant was devoted to establishing the fact that Robert J. Marx and the appellees adopted and used the word 'Diamond' and the picture of a radiant diamond, with the intention or deceiving purchasers and diverting the business of the appellant. The conclusion we have reached renders it unnecessary to consider this evidence. If Robert J. Marx and the appellees ever had such a purpose, they never used any means calculated to accomplish it, and they adopted those admirably suited to defeat

it. Their intention, therefore, becomes immaterial. A wrong done or threatened, and consequent injury, or probable injury, to the complainant, are indispensable elements of every cause of action. The intention to injure another, if no injury is done, and none ever will be done, constitutes no ground for relief. The intention on the part of the alleged infringer to induce purchasers, through the use of a simulated trade mark, to buy his goods under the belief that they are another's, furnishes no ground for relief, unless the similarity between the two trade marks is of character 'to convey a false impression to the public mind, * * * and to mislead and deceive the ordinary purchaser.' McLean v. Fleming, 96 U. S., 256; N. K. Fairbank Co. v. R. W. Bell Mfg. Co., 23 C. C. A., 554, 77 Fed., 869, 876. The reason for this rule is that neither actual nor probable 'injury' in the legal sense of that word, results from the use of a trade mark that is not calculated to mislead the public or to deceive the purchaser, and hence one of the indispensable elements of a good cause of action is wanting. Whatever may have been the intention of Robert J. Marx and the appellees in adopting and using their trade mark, it does not sufficiently resemble that of the appellant to mislead purchasers, or to convey a false impression to the public. There is no evidence in the record that the appellant has ever suffered any injury from any deception caused by it, and there is no probability that it ever will. Such a case presents no ground for relief, either in law or in equity. The decree below is affirmed." (pp. 712, 713.)

Centaur Company v. Marshall et al, 97 Fed., 785, before Justices Caldwell, Sanborn and Thayer—Eighth Circuit—opinion by Justice Sanborn:

"Every suit to restrain the simulation of the dress of merchandise is based on the fact that the defendant will thereby deceive the purchaser into buying his goods as those of the plaintiff, to the latter's

damage. The deceit, or the probable deceit, of the purchaser, so that he buys, or probably will buy, the articles of one manufacturer or vendor in the belief that they are those of another, is a *sine qua non* of such a suit, because everyone has the undoubted right to sell his own goods or goods of his own manufacture as such, however much such sales may damage or injure the business of his competitors. The diminution, injury, even the destruction, of the business of a competitor by such sales is not an injury, in the legal sense, and will warrant no relief, because it is the effect of the exercise of an unquestioned right. In cases to restrain unfair competition by the simulation of trade dresses, it is only when the likeness deceives, or will probably deceive, the buyer into the purchase of the goods of one manufacturer or vendor as those of another, and only to the extent that it thus deceives, that any legal injury results, or that a court of equity may grant any relief. Kann v. Steel Co., 89 Fed., 706, 707, 32 C. C. A., 324, 330, 61 U. S. App., 22; Manufacturing Co. v. Spear, 2 Sandf., 599, 606; Canal Co. v. Clark, 13 Wall., 311, 322, 20 L. Ed., 581; Gorham Co. v. White, 14 Wall., 511, 528; McLean v. Fleming, 96 U. S., 245, 255, 256, 24 L. Ed., 828; N. K. Fairbank Co. v. R. W. Bell Mfg. Co., 77 Fed., 869, 876, 23 C. C. A., 554.

"The case in hand differs from an ordinary suit to restrain the use of simulation of a trade name, in this: that in such a case the duty is imposed upon a defendant of distinguishing the name of his product from the name of the complainant's product, so that a purchaser may not be misled into buying his article as that of his competitor, while in the case at bar the appellees have the same right as the appellant to sell their medicine under the name by which that of the appellant is described and known. The name of the appellant's product is 'Castoria,' and the conceded law of this case, upon this preliminary hearing, is that everyone has the right to make and sell Castoria under the very name which the appellant uses to describe and advertise its medicine. Every

one is presumed to know the law, and, in this state of the case, if the appellees sell their Castoria to those who seek this medicine simply, but who are careless or indifferent whose manufacture they purchase, they may thereby prevent the appellant from making sales and gaining profits which it would otherwise have obtained, but they inflict no remediable injury upon it, and furnish no ground for relief, because they deceive no one, and they violate no duty which they owe to the appellant or to the public, but merely exercise a commercial right which they possess. Every purchaser is charged with knowledge of the fact that anyone may make and sell Castoria, and *if he seeks that made by one manufacturer rather than that prepared by another, it is his duty to examine the wrapper with such a degree of care as would ordinarily ascertain who the manufacturer of the article which he purchases is.* The law imposes no duty upon the appellees to see to it that the careless and indifferent know that the Castoria which they buy is made by the appellant, and not by *another. They discharge their full duty to the appellant if they so dress their product that one who seeks to ascertain whose manufacture it is can readily learn, by a reasonable examination of their wrappers, whether it is made by the appellant, or by themselves.* Coats v. Thread Co., 149 U. S., 564, 567, 572, 573, 13 Sup. Ct., 966, 37 L. Ed., 847.

"Turn now to the wrapper, and see if, in view of these rules of law, a purchaser who sought the appellant's Castoria, and who made an ordinary or even cursory examination of the wrapper of the appellees, would probably be deceived into buying their product in the belief that it was the appellant's. The Centaur Company is a corporation of New York, and its medicine comes from that State. The wrapper of the appellee gives fair warning that the product which it contains *is not made by the appellant, and that it is not manufactured in New York.* It carries on its face the statement, 'Prepared by Castoria Medicine Co., Kansas City, U. S. A.,' and the words

and letters, 'Castoria Medicine Co., Kansas City, U. S. A.' are printed in large, black letters, which would readily catch the eye and fasten the attention of any buyer who examined the product to learn its manufacturer. The radical differences between the wrappers are so marked and striking that such a purchaser can hardly mistake the one for the other. The dissimilarities are carefully noted and enumerated in the opinion of the court below in 92 Fed., at page 610, and we will not receit them again here. Suffice it to say that whether the wrapper of the appellees is taken by itself or in comparison with that of the appellant, whether its general appearance to the inquiring glance of a purchaser who seeks the Centaur Company's product is considered, or it is subjected to a careful and critical analysis of the resemblances and differences between it and the wrapper of the ap pellant, the result is the same. The conclusion is irresistibly forced upon the mind that such a buyer cannot be deceived by it into the purchase of the product of the appellees for that made by the appellant, and that there was no error in the refusal of the court to enjoin its use before the final hearing of the case.

"The arguments of counsel that a more sweeping injunction should have been issued because the appellees were manufacturing spurious Castoria, because they were promoting its sale by fictitious testimonials, because they were using on their wrappers the catch sentence, 'Children cry for it, physicians recomend it,' which the appellant had so advertised that the public recognized it as referring to Castoria, and because their acts disclosed an intent to pirate the business of the appellant, have not been overlooked. But the gravamen of the charge in the bill is not that the appellees are selling spurious Castoria, nor that they are using fictitious testimonials, nor that they are publishing the catch sentence of which complaint is made, but it is that they are selling Castoria under wrappers which deceive the purchasers into the mistaken belief that it is the appel-

lant's product. The vital question on this preliminary hearing is whether or not the use of the wrapper with which the appellees are permitted to clothe their product, under the existing injunction, will probably effect this deceit, and in this way seriously injure the appellant, before this case can be brought to a hearing on its merits. If it will probably have this effect, the injunction should be broadened; if it will not, there is no just ground for its modification. This question has already been carefully considered, and the conclusion has been reached that the use of this wrapper is not calculated to, and probably will not, injure the appellant. This conclusion is decisive of the question now before us. It leaves no basis for a more sweeping injunction, and it must control this appeal. In view of the fact that this main charge of the bill is not sustained by the proof, it will be soon enough to consider the minor questions presented when the issues in the suit have been framed and the evidence has been taken. Nor is the fact that the appellees intended by the use of their abandoned wrappers, by the publication of the extract from Hall's Journal of Health, by the use of the words 'New Label,' and by other acts, to deceive the public and to engage in unfair competition with the appellant, sufficient to overcome the controlling fact that the wrapper which they now use is not calculated to deceive, and probably will not mislead, buyers. If the use of these means of advertising was proof of an intent to deceive the public and to pirate the business of the appellant, the discontinuance of their use is evidence of the abandonment of this intent. Moreover, the intent is only material when the effect of the means used to accomplish it is doubtful. When, as in this case, it clearly appears that the dress used will not deceive, the purpose with which it is used furnishes no sufficient ground for an injunction. A wrong done or threatened, and consequent injury or probable injury to the complainant, are indispensable elements of every cause of action. Neither actual nor probable 'injury' in the

legal sense of that word, results from the use of a trade dress that is not calculated to mislead the public or to deceive purchasers, and hence one of the essential elements of a good cause of action is wanting. the intention on the part of an alleged infringer to induce purchasers, through the use of a simulated trade mark or dress, to buy his goods under the belief that they are another's, furnishes no ground for relief, unless the similarity between the two trade marks is of a character 'to convey a false impression to the public mind * * * and to mislead and deceive the ordinary purchaser.' McLean v. Fleming, 96 U. S., 254, 24 L. Ed., 828; N. K. Fairbank Co. v. R. W. Bell Mfg. Co., 77 Fed., 869, 876, 23 C. C. A., 554, 561; Kann v. Steel Co., 89 Fed., 706, 713, 32 C. C. A., 324, 330, 61 U. S. App., 22." (pp. 788-791.)

American Brewing Co. v. Bienville Brewery, 153 Fed., 615, opinion by Justice Toulmin:

"But in a case of an alleged violation of a valid trade mark, the similarity of brands must be such as to mislead ordinary observers in order to justify a restraining injunction. A court of equity will not interfere when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other. Columbis Mill Co. v. Alcorn, *supra;* Howe Scale Co. v. Wyckoff, 198 U. S., 140, 25 Sup. Co., 609, 49 L. Ed., 972." (p. 618.)

"By comparison, we find the characteristic trade marks and labels of the respective parties to this suit to be as follows: The essential features of the complainant's trade mark as declared in its state ment, are:

"The pictorial representation of a globe, and an American eagle perched thereon, holding with one talon the United States flag, and holding in its beak a pennant or streamer bearing the letters and punctuation marks A. B. C.

"On the defendant's label there is no representation of a globe. The American eagle thereon is much

smaller and of a different color than that of the complainant's. The United States flag is in a different position, is larger, of a brighter coloring, and more conspicuous, and it is not held in the talon of the eagle. There is a wreath of leaves in its beak, instead of a pennant or streamer, and there is an entire absence of the letters and punctuation marks 'A. B. C.,' which prominently appear on the label of the complainant above the word 'Bohemian,' and which letters are declared to be essential features of its trade mark. The word '*Bohemian*' appears on both labels. It is not mentioned in the description of complainant's trade mark as one of the essential features of it, but on the defendant's label it seems to be the prominent word. It is of larger type, and light blue in color, while on the complainant's it occupies a secondary position with regard to the letters 'A. B. C.,' is smaller type, and white in color, with very small, pale blue outlines. *The labels are about the same size and shape.* Both labels have the names of the respective breweries in large, *red* letters, and the names of their location—the complainant's in prominent red letters, and the defendant's in black letters. Are the labels apt to be mistaken by purchasers? There are some minor points of resemblance. Each has an eagle and the United States flag, but of different size and color, and in different positions. Each has the word 'Bohemian,' but different in size of type and color. But we should look at the matter as a whole—both at the resemblances and differences—to ascertain whether, in view of the differences, the resemblances are so marked that the ordinary purchaser would be likely to be deceived or misled. Lorillard v. Peper, *supra*, Galena Signal Oil Co. v. Fuller, *supra;* Lamont Corliss Co. v. Hersher (C. C.), 140 Fed., 763.

"The court, in Lorillard v. Peper, said:

" 'The court must use its own judgment as to similarity of packages and labels, and the fact that others may differ with it in opinion, or that a few

isolated purchasers have been misled, does not necessarily bind it.'

"In the case at bar we find on their respective labels the *names of the manufacturers distinctly and prominently appearing, and also the descriptive name of the beer manufactured by each*—on the one, 'A. B. C. Bohemian,' on the other 'Bohemian,' on the one 'Saint Louis,' in large, red letters, at the top of the label, on the other, 'Mobile, Ala.,' at the bottom of the label. Other distinguishing characteristics have already been shown, and, as before suggested, there is no proof that any purchasers have actually been misled. Their infringement of the complainant's trade mark, as charged, must be clearly shown; and the charge that the defendant is guilty of unfair competition, resulting in confusion of goods, to the injury of the public, and to the invasion of complainant's rights, must be satisfactorily proved."

Postum Cereal Co., Limited, v. American Health Food Company, 119 Fed., 847, before Justices Jenkins, Grosscup and Baker—Seventh Circuit—opinion by Justice Jenkins:

"It is claimed that the name is of similar general character, and in many features identical; that the package used by the defendant is the same in size and shape, and identical in its three dimensions; that the background is of the same color, with the same distinctive features of dress, color and arrangement, and therefore the competition is unfair. We need not enter into discussion of the conflicting evidence with respect to the intention and motive of the officers of the appellee, because that is of no moment, if the dress itself is not calculated to deceive purchasers. Centaur Co. v. Marshall, 38 C. C. A., 413, 97 Fed., 785. The question recurs whether we can say that these *labels are apt to be mistaken*, the one for the other. There may be, indeed, some minor points of resemblance, but we should look at the matter as a whole—both at the resemblances and the

differences—to ascertain whether, in view of the differences, the resemblances are so marked that the *ordinary purchaser* would be likely to be deceived, and should look at the subject in the manner suggested by Mr. Justice Brewer in Lorillard Co. v. Peper, 30 C. C. A., 496, 86 Fed., 956, that:

"'In determining the question of fraudulent imitation of packages and labels, merely noting the points of difference or similarity is not sufficient. The packages and labels must be considered as a whole.'

"The question resolves itself to this: *Whether these two labels are so alike that one of ordinary intelligence, desiring to purchase the one product, would be misled into purchasing the other.* The ordinarily inattentive purchaser is attracted by sound and color, and possibly to some extent by the size of the package. It appears here that the question of the size in the manufacture of the carton for cereals is determined by the proprietors of the paper mills manufacturing them, by the size of a pound of the product, and that all cereal food is sold in like packages. It is proven, also, that a large proportion of packages containing cereal food, before the placing of 'Grape-Nuts' upon the market, was of a yellow background. The background of the two packages in question is somewhat similar in color, although that of 'Grain-Hearts' is of a lighter shade than that of 'Grape-Nuts.' But there are certain distinctive marks which are peculiarly suggestive to the eye, which, in our judgment, so stamp these labels and indicate such marked dissimilarity that we think the purchaser, who, relying upon his knowledge of the character of the brand he wishes, should mistake the one for the other, *would be stupid indeed.* The band in the complainant's label upon which is imprinted the compound word 'Grape-Nuts' in yellow lettering, extends directly across the face of the package, and is said to be of a dark blue color, although 'tis hardly distinguishable from black. The band upon the defendant's package runs obliquely

across the face of the package, and is said to be of a dark blue color, with the compound word 'Grain-Hearts' upon it in white letters, and this band runs across a large red heart, prominently displayed. This device appears upon every side of the defendant's package, while the band of the complainant's package is only upon the face and back. The distinguishing feature of the defendant's label is the red heart. It is so marked and so pronounced that one could not fail to see it, and it would challenge the attention of any person—even a stupid person—who, seeking to purchase the product of the complainant, and knowing its label, should be presented with the product of the defendant.

"The point of resemblance insisted upon in the use of the *double hyphen* in the compound word appears to us of slight moment. It is unusual, indeed, to use the two parallel lines, but we doubt if any but the most observant purchaser would notice it. An inattentive purchaser, using the slightest care, would observe the distinguishing feature of the red heart a hundred times where the careful and attentive purchaser would notice the double hyphen once, and the latter, observing it, would not be deceived, for the same care would disclose the prominently displayed red heart peculiar to the one and absent in the other.

"We need not pursue the subject. We are fully satisfied that the dissimilarities are such, and are so pronounced, that the one label is not likely to be mistaken for the other.

"The decree will be affirmed." (Pages 852-853.)

Continental Tobacco Co. v. Larus & Bro., 133 Fed., 727, before Justices Goff, Morris and Purnell—Fourth Circuit—opinion by Justice Morris:

"This is an appeal from a decree of the Circuit court refusing to grant to the complainant an injunction against the defendant, restraining alleged unfair competition in trade by the defendant selling

its plug smoking tobacco of its brand known as 'Richmond Best Navy,' in competition with complainant's plug smoking tobacco of the brand known as 'Master Workman.'

"The complainant is the owner of a brand of plug tobacco mostly used for smoking, and principally sold in New England, which was originated about the year *1884* by J. Wright & Co., the complainant's predecessor in title, and widely known as 'Master Workman.' The defendant, in like manner, is the owner of a brand of the same class of plug tobacco originated by Larus & Bro., its predecessors in title, about the year *1898*, and known as 'Richmond Best Navy.' The gravamen of the complaint is that by reason of the use by the defendant of a tin tag of the *same size and color* as the complainant's tin tag, affixed to each section of the pound plug of tobacco of the same size and apearance as the complainant's, the defendant has put on the market a plug smoking tobacco, which, by the similarity of the tin tag, in connection with the other similarities, produces confusion and deceives consumers, so that the defendant is unfairly and deceitfully palming its tobacco on unobservant purchasers who desire to get the complainant's tobaco, to the injury of complainant's business.

"This class of tobacco is usually manufactured into plugs weighing about a pound, and in shape about twelve inches long, by three inches broad, and three-quarters of an inch thick. The complainant's plug is indented across at intervals of about two inches by indented lines, marking the plug into six pieces, for convenience in cutting up for the consumer. Each of these pieces is marked with the words 'Master Workman' by indented letters impressed into the surface of the tobacco, and on the reverse side of each piece is indented the name of the original proprietors of the brand, 'J. Wright & Co.'

"The defendant's pound plug is divided by indented lines into five pieces, each of which is in like manner indented with the words 'Richmond Navy Best,'

and on the reverse side of each piece appears in raised letters the words 'Richmond Navy Best.' This method of putting up plug tobacco is shown to be in common use, and not distinctive. In addition to these marks upon each piece of the plug so marked off for convenience in cutting, there is affixed on the tobacco *both of the complainant and the defendant, a yellow tin label or tag, circular in shape, and about one inch in diameter, and it is the use of this yellow tin tag which is the real substance of complainant's charge of unfair competition. The lettering, however, upon the respective tin tags, is distinctively dissimilar.* Upon the complainant's tag appears in black letters, around its circumference, the words 'Master Workman,' and across the diameter in red letters, the word, 'Genuine,' Upon the defendant's tag appears in black letters around the circumference the words 'Richmond Navy,' and across the diameter in very large, red letters the word 'Best.' At the distance at which anything at all can be read on these labels, the lettering is easily distinguishable the one from the other.

"The charge of similarity rests upon the size of the circular tag, which is somewhat larger than the tag most customarily used for the purpose, and the yellow color, which was the color of the tag which complainant from the first adopted. It is shown, however, by the proofs that tags of all colors, yellow included, are used on plug tobacco by manufacturers, and that their sizes vary. There was produced as an exhibit by the defendant a plug of smoking tobacco of the same size and similar in appearance to that of both the complainant and defendant, manufactured and put on the market by the R. A. Patterson Tobacco Company, on which is affixed a yellow tag of just the same size as both that of the complainant and defendant, with the words 'Honest Labor' in black letters around the circumference, and a picture of a workman's arm, in red, in the center. The proof is that this label has been in use for about 10 years. It may possibly be charged

by the complainant that this, too, was a deceitful imitation of the complainant's tag, but if such a charge could be justly made, it is strange that during 10 years it never has been made. The depositions speak of two other brands similarly marked by the defendant as far back as 1881, viz: 'Fairplay' and 'Luxury,' Tin tags and paper tags of a similar appearance, of various shapes, sizes and colors, the witnesses say, have been in common use on plug tobacco for at least 20 years, and this is matter of common knowledge.

"From an inspection of the exhibits, in connection with the weight of evidence, we think it clearly appears that the matters in which the defendant's plug of tobacco is similar to complainant's—that is to say, the size and shape of the plug, the indented marking to assist in cutting off the smaller piece, the use of the indented name of the manufacturer, the use of a yellow tag, lettered with the name of the brand —are in common use, and in the present case the manufacturers' names are easily read, and are so dissimilar that there appears to us no ground for the contention that there is an unfair imitation likely to deceive.

"As to actual deception, the proof is not at all convincing; the most that is established is that the plugs look alike, and, *if the illiterate and inattentive purchaser was guided by the color and size of the circular tag alone, he might mistake one for the other, but that is quite true of* almost all forms of manufactured tobacco. The answer of the defendant, sworn to by the originator of the 'Richmond Best Navy' brand, swears that there was never any purpose or intention to imitate the complainant's 'Master Workman' brand, or to attempt in any way to appropriate the trade of the complainant by creating any confusion as to their respective brands.

"It is urged that the illiterate persons, such as those who mostly use this kind of smoking tobacco, look only at the color and size of the tag, but this is not good ground for relief, for we find from the

proofs that the color and size of the yellow circular tags is not of itself a distinction which either manufacturer can appropriate.

"We think the Circuit Court rightfully decreed that the complainant is not entitled to relief, and the decree is affirmed."

Perhaps the strongest case in the books in support of petitioner's contention is Fairbanks v. Bell Mfg. Co., 77 Fed., 869. From this case it appears that prior to the year 1897, soap powders were uniformly white in color, were sold in comparatively small packages, generally rectangular, holding six ounces, eight ounces, or a pound. In the spring of that year complainant began the manufacture of a yellow powder, and gave it the name of Gold Dust. A new form of package devised by complainant was a radical and distinguishable departure from any soap powder package then in existence. By no possible chance could anyone mistake complainant's package for that of its competitors. It was a larger package, holding four pounds, rectangular, six-sided, and covered with paper of dark yellow color. To quote a further description of the package from the court's opinion:

"A little above the center of the principal panel there is a vignette, representing two naked negro children, standing behind a heap of gold coin; upon a white scroll, which arches over the vignette, there is, in black letters, the word 'Fairbank's'; below the vignette are the words 'Gold Dust'; at the bottom of the panel the words 'Washing Powder,' white, on a black ground. There is no border to this panel, but in the upper corners are two circular spaces, inscribed, respectively, with the mark '4 lbs.,' and with an heraldic device, black on yellow. The rear panel contains a statement, in black letters on the yellow ground, extolling the excellencies of the powder. On

the two side panels, in like manner, are printed statements of the purposes for which the powder may be used, and directions for using it. The lettering runs across these side panels, and justifies with the lines on the back and front panels. On the top and bottom panels are further commendations, and a warning to beware of imitations, all in black letters on the yellow ground. All the panels except the front one are surrounded with a border consisting of a light blue strip included within heavy black lines. The width of the border is a little under one-quarter inch.

"Having devised this distinctive package, complainant offered its goods for sale under the name of 'Gold Dust' washing powder, and has continued the use of that style of package continuously until now. It has made great exertions to extend the sale of its product, has expended upward of $300,000 in advertising it, and has thereby created a large demand in every State and Territory of the United States, having sold upward of 100,000 packages within the twelve months ending June, 1894. Purchasers for consumption usually ask for 'Gold Dust,' sometimes, adding the words 'washing powder,' and sometimes, but more rarely, 'Fairbank's'. Shortly after the introduction of complainant's four-pound package, James S. Kirk & Co. also put upon the market a four-pound package of 'Kirkoline' washing powder, rectangular, and covered with dark yellow paper. Inspection of the package is sufficient to show that, although in size, form and color it is like complainant's they differ so widely in general appearance that one cannot be mistaken for the other. Other exhibits of subsequent packages, rectangular in form, and of the four-pound size, show plainly how easy it is to devise a distinctive style of wrapping which will present no resemblance whatever to plaintiff's package. When it is remembered that, besides size, color and shape, there is an almost endless variety of border, scroll work, lettering and decoration available for the production of what, in the completed package, makes up

the general appearance, it is manifest that no one need pack his goods into cartons resembling his competitor's, unless he choose so to do." (Page 872.)

As far back as 1884 the defendant was making a white soap powder, put up in packages nothing like the new package of the complainant. In 1892 or 1893 defendant began the manufacture of a yellow powder, and thereupon selected a new name and devised a new form of package. Of this package the court says:

"Defendant's package is rectangular, and, of course, of the same size as other four-pound packages. The paper covering it is dark yellow, of about the same shade as complainant's. A little above the center of the front panel is a vignette of a sow washing a pig. The vignette is arched over with a white scroll; but, whereas, the scroll in complainant's package is a segment of a circle, in defendant's it is apparently a segment of an ellipse, and its ends are turned outward towards the edges of the package. On the white scroll, in black letters, is the word 'Buffalo,' and below the vignette the words 'Soap Powder,' in white, partly on a yellow, but mainly on a black ground. On the bottom are the words 'R. W. Bell Co., Buffalo, N. Y.' There is no border on this panel. In its upper corners there are two separate spaces—the one containing the mark '4 pounds,' white on black, the other a buffalo's head, black on white. The rear panel is filled up with commendations of the contents, black letters on yellow ground. The same is true of the top and bottom. On the two side panels are directions for use, such as appeared on the original Soapona package, but they are printed in black on yellow, and the lines no longer run lengthwise, but across, the panel, justifying with the lines on the front and rear panels. Around every panel, except the front one, there is a border, from an eighth to a quarter inch in width, consisting of a very pale blue center, bordered by two heavy black lines. Pos-

> sibly the center of the border is white, but, if so, the heavy black lines, by an optical illusion, give it the appearance of pale blue. The corners of the border in complainant's package are rounded; in defendant's they are right-angled." (Page 873.)

Defendant continued the sale of its yellow soap powder in both the old style package and the new style package, pushing the sale principally in the new package. It was a sharp competitor of the complainant, offering the soap in the same territory at a price of twenty-five per cent. below the wholesale price of complainant. Although there was strong proof of actual substitution by retail dealers of defendant's package, when complainant's was called for, still the trial court reached the conclusion that there was no such similarity as would justify the issuance of an injunction. The Circuit Court of Appeals for the Second Circuit, on an examination of the labels, taken in connection with the testimony of substitution, reached a contrary conclusion, and reversed the judgment of the trial court, but in doing so it distinctly reversed the right of defendant to use a yellow covering for its package. In outlining the order to be entered, the court said:

> "Injunction should issue against putting up and selling or offering for sale the particular form of package which has been referred to in the bill and put in evidence as 'Defendant's Second Package,' or any other form of package which shall, by reason of the collocation of size, shape, color, lettering, spacing and ornamentation, present a general appearance as closely resembling the 'Complainant's Package,' referred to in the bill and marked in the evidence, as does the said 'Defendant's Second Package.' This would seem to be sufficient; but, since so much has been said about the impossibility of framing any decree which would prevent the sale of the package

complained of, and yet not give complainant the monopoly of *yellow* paper for its wrappers, the following clause may be added: 'This injunction shall not be construed as restraining defendant from selling packages of the size, weight and shape of complainant's package, nor from using the designation 'Buffalo Soap Powder,' nor from making a powder having the appearance of complainant's 'Gold Dust,' nor from using paper of a yellow color as wrappers for its packages, provided such packages are so differentiated in general appearance from said 'Complainant's Package' that they are not calculated to deceive the ordinary purchaser." (Pages 878, 879.)

Even in this case it is held that compalinant is not entitled to a monopoly of paper of a certain color for a wrapper for its package. The court's opinion clearly indicates that all that is required is to so mark the packages that they may be distinguished, and in its order the court distinctively reserves to the defendant the right to use the yellow wrapper. In the case at bar the petitioner is claiming a monopoly of the brown label, and it asserts this claim, no matter what distinguishing marks are placed thereon, and when your Honors stop to consider the many breweries that are putting out beer in bottles, and that are using labels thereon, the result of giving to any one brewery an exclusive right to any given color would be to limit the use of colored labels to a favored few. The obtainable colors are few, and no manufacturer of beer has a right to an exclusive use of any given color in its labels. Such we understand to be the uniform ruling of the courts on this point.

American Tobacco Company v. Globe Tobacco Company, 193 Fed., 1015, opinion by Justice Angell:

> "It is insisted that the use on three of the packages of the words in quotation marks, 'The Labor

Leader,' above the word 'Union,' and at same distance from the word 'World,' amounts to an infringement of trade mark, and a wrong to complainant, in view of the general likeness of the size and color of the packages, and of the way in which, and the extent to which, the complainant has advertised its goods. There are some resemblances in the packages, but most of them arise 'from features which have been combined in common use and to which no one has exclusive right.' *That anyone is deceived by the size, shape, tinfoil, or general makeup of the package, or by its paper, lettering, or color, does not help the complainant's case. All these are old, separately and in combination.* The complainant must show deception arising from some features of its *own* not common to the public. Lowell, J., in U. S. Tobacco Co. v. McGreenery (C. C.), 144 Fed., 532, affirmed 144 Fed., 1022, 74 C. C. A., 682. In that case the maker of 'Central Union' cut plug sought to enjoin this complainant from putting out 'Union Leader' without the tri-colored band above mentioned. Injunction was denied. The Central Union package is in evidence here. The Union Leader package without the band, in my judgment, is more easily mistaken for the Central Union than for the Union World. Complainant has no exclusive right to the red color, nor to the size and shape of the packages, nor to the use of the gilt letters on them. These things are undeniably open to trade.

"The controlling question in this case is: Has the complainant any just ground of complaint because of the use by defendant or its package of the words 'Leader' and 'Union' as they appear?

"The rule is settled that 'equity will not interfere where ordinary attention by the purchaser would enable him to discriminate' between the goods put out by the parties, and that one is not bound to prevent a purchase by a careless purchaser. McLean v. Fleming, 96 U. S., 245, 24 L. Ed., 828; Coats v. Merrick Thread Co., 149 U. S., 562; 13 Sup. Ct., 966, 37 L. Ed., 847; Columbia Co. v. Alcorn, 150 U. S., 467,

14 Sup. Ct., 151, 37 L. Ed., 1144; Lorillard Co. v. Peper, 86 Fed., 956 30 C. C. A., 496; Continental Co. v. Larus, 133 Fed., 729, 66 C. C. A., 557; Regensburg v. Portuondo Co. (C. C.), 136 Fed., 869; American Brewery Co. v. Bienville Co. (C. C.), 153 Fed., 615; Jamison Co. v. Jamison, 15 R. P. C., 189; Fels v. Hedley Co., Ltd., 21 R. P. C., 91; King & Co., Ltd., v. Gillard & Co., Ltd., 22 R. P. C., 327.

"With the *tri-colored band in use*, it is hard to see how a person, even illiterate, who cared at all what goods he got, could be deceived into taking defendant's goods for complainant's. The testimony as to deception in the record, if admissible, only goes to show that careless purchasers have probably been deceived, not that purchasers who took enough interest in their purchases to look at the packages before pocketing them, were deceived. The defendant puts on its package nothing remotely resembling the distinguishing band used by the complainant.

"It is urged by complainant that the court ought not to regard this tri-colored band. But it had been used by complainant after the decision of the McGreenery case for some time before defendant began putting out 'Union World,' and there seems to be no just reason for overlooking it in the makeup of complainant's goods. But, if it were disregarded, I am not prepared to hold that a person exercising ordinary care in buying would be deceived by the packages. As above stated, he would, in my opinion, be less likely to be misled by the likeness of the packages involved in the McGreenery case. The testimony for complainant indicates that the ground of mistake would be the red package, and the use of the word 'Union.' Clearly the defendant cannot be forbidden to use a red wrapper with the word 'Union' on it. In the present case that word on the smaller packages is printed in distinctly different type from the word on complainant's package, and is above a symbol wholly unlike that on complainant's package." (Pages 1017, 1018.)

Newcomer & Lewis v. Scriven Co., 186 Fed., 621, Sixth Circuit, before Justices Lurton, Severns and Knappen, opinion by Justice Lurton:

Scriven & Co. were makers of men's drawers, of cotton material. A woven fabric made of Egyptian cotton was inserted in the seams, to make the garment elastic. This knitted fabric was of a buff or yellowish color in its undyed and natural state. Complainants had had a patent on the garments so made. After the expiration of the patent the defendants began the making of a similar garment, using buff colored fabric in the seams. The purpose of the injunction was to prevent defendants from making and selling men's drawers in connection with which the fabric of the characteristic color was used. The trial court granted an injunction. The Circuit Court reversed the trial court and dismissed the bill. Judge Lurton said:

> "Color, except in connection with some definite arbitrary design, such as impressed upon a circle, star or other figure, or employed in definite association with some other characteristics which serve to distinguish the article as made or sold by a particular person, is not the subject of monopoly as a trade mrak."

Coats v. Merick Thread Co., 149 U. S., 565, opinion by Justice Brown:

In the bill of complaint in this case, J. & P. Coats charged that the Merrick Thread Company were guilty of an unlawful and unfair competition in business, in that they had been infringing the right of plaintiff in and to certain marks, symbols and labels used by plaintiff to designate a spool of thread put out by it. Cuts showing the ends of the two spools are shown at page 566 of the

opinion. On the end of each spool is affixed a paper label with black letters on a gilt ground. On complainant's labels were the words "J. & P. Coats Best Six Cord, 200 yards," and in the center, figures 40, denoting the size of the thread. Outside of this label, and embossed on the end of the wooden spool, in each quadrant of the circle, are the figures 40, likewise designating the size of the thread. On defendant's label, in black letters on a gilt background were the words, "Merrick Thread Company, Best Six Cord." The label has a star in the center, and at its lower edge the figures 40, indicating the size of the thread. Outside of the label, and on the four quadrants of the circular end of the spool are the figures 40, likewise denoting the size of the thread. Between these numbers on defendant's spool are stars, instead of the loops shown on plaintiff's spool. Plaintiff's spool had been on the market in America since 1840, and their spools have borne the black and gold label as above described since that time. In holding that the plaintiff was not entitled to an injunction, among other things, the court said:

> "There is no doubt a general resemblance between the heads of all spools containing a black and gold label which might induce a careless purchaser to accept one for the other. Defendants, however, were not bound to any such degree of care as would prevent this. Having, as we have already held, the right to use the black and gold label, and the periphery embossed with the number of the thread, they were only bound to take such care as the use of such devices, and the limited space in which they were used, would allow. In short, they could do little more than place their own name conspicuously upon the label, to rearrange the number, by placing it in the border, instead of the center of the label, and to omit loops of the plaintiff's periphery, and substitute their own star between the numerals. Having done this, we

think they are relieved from further responsibility. If the purchaser of such thread desires a particular make, he should either call for such, in which case the dealer, if he put off on him a different make, would be guilty of fraud, for which the defendants would not be responsible, or should examine himself the lettering upon the spools. He is chargeable with knowledge of the fact that any manufacturer of six cord thread has a right to use a black and gold label, and is bound to examine such label with sufficient care to ascertain the name of the manufacturer. Indeed, the intent to imitate plaintiff's spool heads, if any such intent existed, is manifest rather in the label than in the periphery, but plaintiffs having submitted to this without protest for twelve years, have waived their right to relief upon this ground. McLaughlin v. People's Railway Co., 21 Fed. Rep., 574; Ladd v. Cameron, 25 Fed. Rep., 37; Green v. French, 4 Bann. & Ard., 169; 3 Rob on Pats., p. 1194. Having already held that defendants had a right to make use of the embossed numeral in the periphery, their union of the two devices upon the same spool head, both being originally designed to be used in conjunction, cannot be made the basis of a suit."

United States Tobacco Company v. McGreenery et al., 144 Fed., 531, Circuit Court, District of Massachusetts. Opinion by Lowell, Circuit Judge (affirmed 144 Fed., 1022).

This is a bill in equity to restrain unfair competition, which is alleged to arise from defendant's imitation of complainant's paper label or wrapper used to make up packages for cut tobacco. The packages are of the same size. The paper is of the same quality and dark red color. The lettering is gilt, and the conspicuous words are printed in much the same type. After giving a detailed description of the two packages, the court continues:

"Wrappers like those of the complainant, in shape, size, tinfoil, colored paper, and style of gilt lettering, have long been common. The defendant owns several 'brands' of this sort, which are older than the complainant's. The color of the paper has long been used to designate a mild tobacco. Varied devices, unlike complainant's or defendant's, have been printed upon similar packages. 'Cut Plug' merely describes the kind of tobacco inclosed. The phrases 'Smoke and Chew' and 'Smoking-Chewing' are also old in the art. Gail v. Wackerbarth (C. C.), 28 Fed., 286. That the packages considerably resemble each other is obvious, but most of the resemblance arises from features which have been combined in common use, and to which no one has exclusive right. That anyone is deceived by the size, shape, tinfoil, or general makeup of the package, or by its paper, lettering or color, does not help the complainant's case. All these are old, separately and in combination. The complainant must show deception arising from some feature of its own, not common to the public. As was said in Coats v. Merrick Thread Co., 149 U. S., 562, 573, 13 Sup. Ct., 966, 970, 37 L. Ed., 847, the purchaser of thread 'is chargeable with knowledge ofthe fact that any manufacturer of six cord thread has a right to use a black and gold label, *and is bound to examine such label with sufficient care to ascertain the name of the manufacturer.*' 'He (the plaintiff) must make out, not that the defendant's are like his by reason of those features which are common to them and other people, but he must make out that the defendant's are like his by reason of something peculiar to him, and by reason of the defendant having adopted some mark or device or label, or something of that kind, which distinguishes the plaintiff's from other goods which have, like his, the features common to the trade. Unless the plaintiff can bring his case up to that, he fails.' Payton v. Snelling, 17 R. P. C., 48, 52. 'The evidence is very strong that one tin may be mistaken for the other, very likely; but why? Because of the features common to them and

common to all.' Payton v. Snelling, 17 R. P. C., 628. 'The only question you have then to consider is whether the defendant's get-up is so like the plaintiff's as to be calculated to be mistaken for it. But when, as in this case, and in the last, what is called the plaintiff's get-up consists of two totally different things combined, namely, a get-up common to the trade, and a distinctive feature affixed or added to the common features, then what you have to consider is not whether the defendant's get-up is like the plaintiffs' as regards the common features, but whether that which specially distinguishes the plaintiffs' has been taken by the defendants.'" (Payton v. Ward, 17 R. P. C., 58.

* * *

Proctor & Gamble Co. v. Globe Refining Co., 92 Fed., 358, Circuit Court, Sixth Circuit, before Justices Taft, Lurton and Severens, opinion by Justice Severens.

The court thus describes the packages involved in this suit:

"The packages in which the respective parties put up their soap for the market are simlar in form and size, being about 4 inches long, 2¾ inches wide, and 1½ inches thick. The label of the complainant, printed upon the wrapper on the upper flat surface of the cakes, consisted in large part of the words 'Every Day Soap'; the first two words being in large, fancy letters, in a curved line, in the upper part of a rectangular space about the size of the cake, and the word 'Soap,' also in large, fancy letters, under the former words. In the lower left-hand corner is a circular figure, about three-fourths of an inch in diameter, in the resemblance of a full moon, bearing a human face within it, looking to the left; the rest of the contents of the circle being a black field, with 13 white stars thereon. At the right of this, and extending across three-quarters of the length of the label, are the words 'Proctor & Gamble,' and under

these the word 'Cincinnati,' all in good-sized letters. There is some additional matter of ornamentation. All the foregoing characters were stamped or printed upon the face of light yellow paper. Upon one edge of the cake, or, rather, upon the wrapper, where it covers the side of the cake, there were printed the words 'Manufactured at Ivorydale,' 'Factories conducted on the profit-sharing plan,' in two lines, on a rectangular space about three inches long and half an inch wide, of the same light yellow color. The rest of the complainant's wrapper is of a darker color, filled with an obscure, uniform ornamentation. The first of the defendant's labels (being the one the use of which was enjoined) was of the same color as the complainant's, and bore upon its face, in letters, the words 'Everybody's Soap'; the letters being in about the same style as the complainant's, and formed in a very similar manner. There was a circular figure of the same size in the lower left-hand corner, but filled with different characters. At the right-hand of this, where the complainant printed the words 'Proctor & Gamble,' the defendant printed the words 'Globe Refining Co.' Underneath this was 'Louisville, Ky.,' instead of 'Cincinnati' in the complainant's label. On the wrapper along both edges of the cake was printed other matter, having no resemblance to that of the complainant's. This wrapper had been in use for a few weeks only when the original bill was filed, and was thereupon discontinued. The defendant had been previously engaged for a much longer time in the manufacture and sale of the same or similar soap. The defendant's second label (the one now in question) was adopted, as the defendant claims, to obviate the objections which had been made to the use of the first. *The wrapper was of the same color as before.* The label on the upper surface of the cake was black, except where lettered. It bore the words 'Everybody's Soap,' the word 'Everybody's' being in script; the letter 'E' being a capital, and the rest in ordinary style, though all were of good size, and

plainly readable at some distance. The word 'Soap' was in plain type, in smaller letters, and both were arranged in a similar relation to each other and to the surface of the label as the words 'Every Day' and 'Soap' in the complainant's label, except that the word 'Everybody's' was straight, instead of circular, running from near the lower left-hand to the upper right-hand corners, and the word 'Soap' filled the space in the lower right-hand corner. The color of the letters was light yellow, and the letters appear to consist of the wrapper itself showing through the black field of the label surrounding them. There was no circle in the lower left-hand corner, as in the complainant's label and the first of the defendant's, and there was no name of the manufacturers and their place of business, as in those. There was scarcely any ornamentation, the whole being of plain style. On one side of the cake upon the wrapper was printed in black letteres the words 'Everybody's Soap,' 'Made by,' 'Globe Refining Co., Louisville, Ky.,' in three lines; and on the other, 'Everybody's Soap,' 'Best, goes farthest,' in two lines. The rest of the wrapper was filled with pictures of a cavalcade, illustrating how all classes and peoples glorify 'Everybody's Soap.' "

* * *

"The complainant alleges, among other things, that it has for many years put up its soap in the form, size and color of package in which it now does, and that from these peculiarities and its label the public have thereby become familiar with its goods; and it is further charged that the defendant imitates its package, in the form and size of it, as well as the color of the wrapper. But, if it were conceded that the complainant could acquire an exclusive privilege to the use of such characteristics, it is not shown that their practice in respect to either the form or size of the cake or the color of the wrapper was peculiar to themselves, and *non constat* that other manufacturers, including the defendant, were accustomed to put their goods in the same style in respect to

these peculiarities. This part of the case stands on the same footing as did the black and gold labels on the ends of the spools whereon the plaintiff's trade mark was printed in the case of Coats v. Thread Co., *supra;* such labels having become common property. Aside from these features, there are not many points of similarity. The principal one is the use in both labels of the word 'Every' in the complainant's, and as a component part of the word 'Everybody's' in the defendant's, upon the wrapper on the upper surface of the cake, which is the only place where it occurs on the complainant's package. But in this context it should be noted that all the letters on this surface of the package are printed in black, upon a light yellow ground, while on the defendant's the letters are light yellow on a black ground. In the complainant's the letters are in the similitude of type-written letters ornamented, while the defendants are in script. On the defendant's label the figure of the moon and the characters exhibited therein by the complainant's is not shown and the name of the manufacturer, which, on the complainant's label, is quite plainly shown, is not printed on the defendant's. The print and characters displayed on the sides and back of the defendant's wrapper bear no resemblance to anything on the complainant's. On one side of the complainant's the place of manufacture is stated to be Ivorydale. On the defendant's it is stated as at Louisville, Ky., and the name of the manufacturer, 'Globe Refining Co.,' is distinctly shown. *Thus, on each wrapper, the name of the respective manufacturers is conspicuously shown, and this is one of the important means of identification.* P. Lorillard Co. v. Peper, 30 C. C. A., 496, 86 Fed., 956, 959. By the sight of the package, or by hearing the distinctive appellation read, customers would, in general, if not universally, identify the goods they were buying. It is hardly conceivable that anyone familiar with the appearance of the complainant's package, who looked to the article he was purchasing to see whether it was the

same, could fail to notice the difference, on the defendant's package being offered to him. The retail dealer would, beyond doubt, know the difference. Both seller and buyer would know that manufacturers generally put up their goods in the same shape and style, and the slightest inspection of the other characteristics would indicate the difference. If the consumer called for 'Every Day' soap, and the retailer supplied him with 'Everybody's' soap, it would be a fraud for which the defendant would not be liable, as was pertinently said by Mr. Justice Brown in Coats v. Thread Co., already cited. And in passing, we observe that what is mainly relied on in the present case as the imitation so injurious to the complainant, namely, the use of the word 'Every' is not more likely to produce confusion with purchasers than where the use of the words 'Best Six Cord' on the black and gold labels of the parties in the case just referred to, where an injunction was denied. But it is said that the evidence shows that the defendant's officers studied how closely they might approximate the complainant's label without exposing themselves to suit, and that this indicates a purpose to purloin the complainant's good will. The evidence does show that such consultations took place in reference to the first label, but it is also shown that on discontinuing that they took legal advice in regard to the making of a new one. If they were intending to devise a new label which might attract purchasers by an alluring advertisement, they might lawfully do this, if they made it in such a form and style as would not lead purchasers to think they were buying the complainant's goods. The evidence does not clearly show that there was bad faith in devising the new label. It is not inconsistent with an honest purpose."

The judgment of the trial court in refusing an injunction was affirmed.

Philadelphia Novelty Mfg. Co. v. Rouss, 40 Fed., 586, Circuit Court, Southern District of New York, opinion by Justice Coxe.

This is a suit in which the complainant charges defendant with infringing its right in the use of wrappers and labels used in putting up hair pins:

> "The contention is therefore narrowed down to the question whether any right of the complainant is violated because the defendant sells crimpers wrapped in tan-colored paper, and packed in red boxes. It is thought that the affirmative of this proposition cannot be maintained, and especially so in the absence of proof that purchasers have been deceived. There is, of course, a general similarity between all crimpers of this pattern; but no one who thoroughly understood the distinguishing features of the complainant's crimpers, and preferred them to the defendant's, could ever mistake the latter for the former. In addition to the differences of the labels, before adverted to, the complainant's crimpers are smaller than the defendant's, and much heavier—a box of them weighing over three times as much. The wrappers, too, are unlike. The defendant's wrapper is about two and one-fourth inches in length, and contains nothing but the printed words of the 'Lanktry' white label. The complainant's, on the contrary, is nearly four inches in length, and in addition to the words of the 'Madam Louisa' white label, there appears the complainant's vignettes, directions for use, and a caution against 'Spurious imitations.' In short, there are marked differences in everything except in the color of the boxes and wrappers, and these differences are so pronounced and unmistakable as to overshadow the two points of similarity. The language of Mr. Justice Field, in Tobacco Co. v. Finzer, 128 U. S., 182, 9 Sup. Ct. Rep., 60, seems applicable:
>
> " 'The judgment of the eye upon the two is more satisfactory than evidence from any other source

as to the possibility of parties being misled so as to take one tobacco for the other; and this judgment is against any such possibility. Seeing, in such case, is believing; existing differences being at once perceived, and remaining on the mind of the observer. There is no evidence that anyone was ever misled by the alleged resemblance between the two designs.'

"There is no such evidence here. The proof is overwhelmingly to the effect that a purchaser really preferring the 'Madam Louisa' crimpers, and desirous of procuring them, could not be deceived by the defendant's crimpers, unless she were afflicted with partial blindness, an arrested mental development, or an unusually heedless disposition. The law cannot take cognizance of conditions so abnormal. In Adams v. Heisel, 31 Fed. Rep., 279, the court, in dealing with facts quite similar to those in hand, observes:

" 'The complainants could not obtain a trade mark for the form of the sticks of chewing gum they might manufacture, nor by the use of a peculiar form and decoration of the boxes they may use to hold the sticks of gum, nor in the manner in which the gum might be placed in the boxes. These qualities and forms are common to the manufacture, and may be made similar without injury to others who may use the same forms. * * * The complainant cannot now so broaden and enlarge their trade mark as to cover the whole box, with all its ornaments and forms of putting up the gum, and the colors used in such decorations, and thereby prevent others from using these forms of putting up gum for sale.'

"*The trend of the law is strongly towards the proposition that in ordinary circumstances the adoption of packages of peculiar form and color alone, unaccompanied by any distinguishing symbol, letter, sign, or seal, is not sufficient to constitute a trade mark.* Fleishman v. Starkey, 25 Fed. Rep., 127; Fairbanks v. Jacobus, 14 Blatchf., 337; Sewing Machine Co. v. Gibbens Frame, 17 Fed. Rep., 623; Moorman v. Hoge, 2 Sawy., 78; Faber v. Faber, 49 Barb.,

358; Davis v. Davis, 27 Fed. Rep., 490; Falkinburg v. Lucy, 35 Cal., 52; Chemical Co. v. Stearns, 37 Fed. Rep., 360; Browne, Trade Marks, pars. 271-272. The courts will have time for little else if they undertake to meddle with and regulate the color and size of the wrapping paper and boxes in which a shopkeeper displays his wares. Trade should not be hampered by vexatious restrictions in matters apparently so trivial."

Fleishmann et al. v. Starkey, 23 Fed., 127, Circuit Court, District of Rhode Island, opinion by Justive Colt:

"The complainants are the owners of certain trade marks used upon their packages of compressed yeast, and they charge the defendant with an unlawful imitation of the same. It is clear, on a comparison of the labels, that the *defendant is not guilty* of any infringement *unless the use of a yellow-colored label makes him chargeable.* The position taken by the complainants that the essential part of their trade mark consists of a label having a yellow color, and that, therefore, they cover all yellow-colored labels used upon compressed yeast, and that the use by the defendant of a yellow-colored label upon the compressed yeast made and sold by him constitutes an unlawful imitation of their trade marks. The defendant has taken no testimony. The evidence of the complainants goes to prove that yeast with a yellow label sells readily, while yeast with a white label or any color other than yellow sells with difficulty—the cause of this being the reputation acquired in the market of the article manufactured by the complainants; and, further, that the public are deceived into buying other and inferior yeast having a yellow label as the genuine yeast made by them. *This case narrows itself down to the question whether a label of a single color, like the one in controversy, is the lawful subject of a trade mark apart from any name, figure, or device with which it may be connected, so that a person who adopts a similar color upon his*

*label may be charged with an unlawful imitation.* Color often serves as the groundwork of a trade mark, and it may be a very essential element in its composition. In determining the question of infringement, it is often a very important circumstance. Browne, Trade Marks, pars. 263, 265, 267. But the term 'Mark' implies form rather than color, and it consists of some peculiar name, symbol, figure, letter or device whereby one manufacturer distinguishes his goods from like goods sold by other persons. Falkinburg v. Lucy, 35 Cal., 52. *The color of a label, apart from a name or device, can hardly be the subject-matter of a trade mark. The effect would be that a single manufacturer might acquire the exclusive right to the use of labels of a certain color, or to the colored paper in which his goods might be wrapped.* This might seriously interfere with trade and with legitimate competition. Browne, Trade Marks, pars. 271-272. Whatever view may be taken by the French courts in the cases referred to by the learned counsel for complainants, we know of no American or English authority which goes to this extent. On the contrary, so far as the point has been touched upon in the adjudicated cases which have come to our notice, an opposite conclusion seems to have been reached. Falkinburg v. Lucy, *supra;* Faber v. Faber, 49 Barb., 357.

"It follows that the defendant, in using a label of a yellow color, is not guilty of any infringement of complainants' trade marks, and that the bill should be dismissed."

Brown et al. v. Seidel et al., 153 Pa. St., 60:

"The respective parties are engaged in the manufacture and sale of an article of stove polish, and there certainly is a resemblance in the size of the packages, and in the manner in which they are put up, between those of the defendants and the plaintiffs. They both use tinfoil as wrappers for the stove polish, over which is placed a paper wrapper of similar colors. The packages as thus put up might per-

haps induce an ignorant or a careless person to mistake the one for the other, provided he made no examination whatever. *The mere possibility of a mistake, however, is not sufficient.* As was said in Heinze v. Lutz, 146 Pa., 592: *'It is not enough that there may be a possibility of deception. The offending label must be such that it is likely to deceive persons of ordinary intelligence.'* See authorities there cited."

Heinze et al., v. Lutz et al., 23 Atl., 314, Supreme Court of Pennsylvania:

This is a suit in which one fruit dealer sought to enjoin another from using a fruit label which resembled his own in color and arrangement of the fruit. There was no similarity in those parts which might be claimed as a trade mark. One was called "Keystone Brand," and the other "Diamond Brand." The name of each dealer appeared on his label in large letters of different colors. In reversing the award on an injunction by the trial court, the court said:

"It is not enough that there may be a possibility of deception. The offending label must be such that it is likely to deceive persons of ordinary intelligence. It is not necessary to show that persons have been deceived, yet the finding of the Master that no one has been deceived, although defendant's label has been in use for some time in the same vicinity as that of the plaintiffs, is certainly strong evidence in support of defendant's allegation that their label is not likely to deceive. Dixon v. Guggenheim, 7 Phila., 408, decided by the writer when sitting in the common pleas of Philadelphia, has been so generally accepted as law that I may be excused for giving a brief extract from the opinion in that case:

" 'That a similarity between two trade marks used by different manufacturers for their goods although of such character as to induce a belief in the mind of

the public that they belong to and designate the goods of the same manufacturer or trader, is not of itself sufficient ground for the prohibition of the use of such trade mark by him who did not first adopt it. That similarity, to entitle the originator to the protection of the law, must be such as to amount to a false representation, not alone that the two articles have the same origin, but that the goods to which the simulated mark is attached are the manufacture of him who first appropriated the trade mark.' "

Ball v. Siegel, 4 N. E., 668, Supreme Court of Illinois:

In refusing to enjoin the use by one corset manufacturer of a box in which his corsets were sold charged to be similar to that of the plaintiff, the court said:

"It is true that, in cases of this kind, as a general rule, exact similitude is not required to constitute an infringement, or to entitle the complaining party to protection; but if the form, marks, contents, words, or their special arrangement, or general appearance of the words, of the alleged infringer's device are such as would be likely to mislead persons in the ordinary course of purchasing the goods, and induce them to suppose that they were purchasing the genuine article, then the similitude is such as entitles the injured party to equitable protection if he takes seasonable measures to assert his rights and prevent their continued invasion. Thompson's note to Popham v. Cole, 23 Amer. Rep., 28. But the court is not bound to interfere where ordinary attention will enable purchasers to discriminate between the trade marks used by different parties."

Enoch Morgan Sons Co. v. Troxell et al., 89 N. Y., 292:

"The only points of similarity between the two articles sold are that they are both small cakes of soap, covered with tinfoil or tinned paper, and having a blue band around them, with gilt lettering. The cakes are not even of the same shape, one being near-

ly square, and the other an oblong. But we are of opinion that this form of package, with a blue band and gilt lettering, could not be appropriated by the plaintiff as a trade mark. There is nothing peculiar about it, and it is an appropriate and usual form in which to put up small cakes of soap, and the law of trade marks has not yet gone so far as to enable a party to appropriate such a form of package and fashion of label, and exclude everyone else from its use, or from the use of anything resembling it. If it had, the different forms and fashions of cigar boxes, packages of chewing tobacco, perfumery, canned goods, and other small articles, and the color or style of labels which every dealer, according to his taste, adopts or selects from those in use, would afford food for litigation sufficient to give constant occupation to the courts.

"All these articles of each class bear a general resemblance to each other, and the products of the different dealers can be distinguished only by the brands, marks or names which they may put upon them, and these can be protected as trade marks only so far as they are new and comply with the other conditions necessary to constitute a trade mark.

"When there is a simulation of a trade mark, and the intent becomes a subject of inquiry, the form, color and general appearance of the packages may be material, but to sustain an action there must be an imitation of something that can legally be appropriated as a trade mark. When we come to look at the brands or contents of the labels they are entirely different. The label of the plaintiff, on one side of the package, is 'Sapolio for cleaning and polishing, manufactured by Enoch Morgan's Sons & Co., 440 West Street, New York,' and on the other side 'Enoch Morgan's Sons' Sapolio,' with a well-drawn figure of a human face opposite a pan, and reflected in it."

* * *

"If, as we think, there was no imitation of any trade mark of the plaintiff, the judgment cannot be

sustained on the ground of fraudulent representations, or devices on the part of the defendants to palm off their goods upon individuals as the goods of the plaintiff. What remedy there is for such a wrong if proved it is not necessary now to inquire, but the remedy clearly is not to restrain the defendants from selling their own goods in packages, and with labels which they have a legal right to use, and which do not infringe upon any trade mark of the plaintiff.

"The judgment should be reversed, and a new trial ordered, costs to abide the event."

Mr. High, in his work on Injunctions, says, paragraph 1076:

"There can be no trade mark in the exterior color or form of the articles, and hence no injunction to protect the plaintiff in the manufacture of the article of the peculiar form or color. So, a package or barrel cannot by reason of its peculiar form. dimensions or shape, independent of any symbol, figure or device impressed upon or connected with it, constitute a trade mark, and will not be protected by injunction."

Nims, in his work on Unfair Business Competition, says:

"Generally speaking, a trader cannot be entitled even after long and exclusive use, to monopolize a particular color or a particular shape, size or style."

In Mumm v. Kirk, 40 Fed., 589, complainant's champaigne was known as "Mumm's Extra Dry," and the bottle had a capsule of a peculiar color. Defendant used a capsule of similar color, and described his wine as "Extra dry." His labels were entirely different, but the labels often dropped off in cooling, before the bottle reached

the consumer. There were minor differences in dress in addition to the difference in labels. Defendant was not required to change the color of his label.

**Conclusion.**

While the Houston Ice & Brewing Association cannot boast of being "the largest institution of its kind in the world," it can justly claim that, among the industries of its kind it stands, with respect to volume of business and excellence of its product, second to none in the State of Texas. It is not an unknown institution, or one without a reputation for honesty and fair dealing. The history of the growth of its business attests this. This history is set forth in the record.

Beginning in 1893 with gross sales slightly in excess of $200,000.00, its record (Tr., 142, 143) shows an increase each year over the preceding year, without exception, scarcely, until in 1914, when the gross sales for that year amounted to but little less than two millions of dollars.

Beginning in 1893 with a total output (Tr., 141) of 25,738 barrels, the history of its brewery shows an increase, year by year, and each year, until in 1914 its output amounted to 178,000 barrels, equal to the output of its first year multiplied seven times over, and equal to over *fifty-three million bottles of beer.*

Its brewery, in the ten years next preceding the year in which the case was tried, actually bottled and sold over sixty-two million bottles of beer (Tr., 142, 143), and this in addition to a larger quantity of keg beer. In six years of this period, constituting the past portion of it, the "largest institution of its kind in the world" marketed in Texas twelve million bottles *less* than this.

Nor has this result been accomplished by offering a cheap substitute for the beer of its great competitors. It has not sought the cheaper trade. (Tr., 109.) On an average, it has received $9.00 a cask for its beer *delivered*, and the complainant has received on an average $9.75 a cask for its beer *delivered*. Taking into consideration the difference in distance of the respective breweries, from the market to which this beer was sold, it is perfectly plain that during this period the *Houston Ice & Brewing Association has received more for its beer than the complainant has for its.*

The Houston Ice & Brewing Association has a good will of its own. It is not seeking to build itself up on someone else's reputation. Ever since 1893, and up to the time prohibition became effective in Texas, it has been manufacturing a beer under one name. The bottles of this beer that have been sent out by it broadcast over the market in which it deals, run up into millions. During this time it has constantly sought to manufacture a beer as good as any. (Tr., 109.) With such a history it could not have failed to make a reputation for itself. It is vitally concerned in protecting this reputation.

It is not, and has not been, necessary for it to "steal" the trade of any rival or competitor. It is not, and has not been, necessary to commit fraud to market its goods. "Did you or any of the officers of the company," Mr. Autrey, the manager of the brewery, was asked, "know that Mr. Harlan or anyone else in the employ of the company were, if it was a fact, representing that the beer manufactured by the respondent could be sold unbeknown to persons for Schlitz beer?" His answer: "Positively, no; I would not countenance such conduct of that kind on the part of our representatives."

Nor is there any such evidence. The trial judge saw the witness that gave this testimony, and was in a position to say whether the answer was true or untrue. If the representatives of the Houston Ice & Brewing Association were sent out to advocate the sale of its product because *it could be fraudulently sold for Schlitz beer*, Mr. Autrey knew it. If he didn't know it, it did not occur.

Petitioner had the names of these representatives. It could have produced them as witnesses, but none were called. With the agencies and instrumentalities which the petitioner on the trial showed that it possessed for scouring the country in search of testimony, it is fair to presume that these men were found, and that their statements would not support the charge made.

The manner in which respondent's new label was chosen has been stated. With a situation approaching where the dark bottle, because of the advantages attributed to it, would constitute over 85 per cent. of the containers of its beer, the Houston Ice & Brewing Association, for the obvious reason that the white label could not be used, sought a new label, and in doing so selected a color which it thought made a presentable appearance. This may have been because, independently, the color does harmonize with the bottle; or it may have been it merely thought it did. Upon this label it put its name in unmistakable terms. For the size and shape of the label it chose something new and different from anything that was being used. Every essential feature of the label pointed to it as the manufacturer. For the neck label it chose something equally distinctive. With this new label it set out to further increase the volume of its business and increase its good will.

When complaint of this label was made, it readily

agreed to remove the one feature of the label to which it thought exception could be made; and did remove it. But this did not satisfy complainant. The *color* of the label still remained; and petitioner would not be satisfied if the color remained the same, no matter what the other features of the label were.

The desire of petitioner to have a label which will indicate its beer to the Cuban and Mexican, to the Hindu and the Cossack, the Jap and the Chinee, the literate and the illiterate. The world-wide trade which it claims to enjoy distinguishes the instant case, it says in its brief, from any which have been decided by the court. This desire is a natural one. We hope it may be gratified; but it cannot be gratified if nothing will suffice but that all other beer dealers shall abstain from the use of a brown label of any sort on a brown bottle. This would be conferring a monopoly which the courts have said should not be done.

If petitioner set out with such a desire, when it sought a new label in 1914, and if the present one will not accomplish it unless all other brown labels on brown bottles of beer are for all time forbidden, the mistake that is made is apparent. It should have chosen a more striking and distinctive mark or sign for its label. The brown color was proper, but it should have taken something in connection with such label of an original character that was of *striking appearance* and that would have been known at a glance. The red diagonal band of Anheuser Busch is illustrative. This has a meaning. If petitioner's protection under the label adopted depended upon the exclusive right to use the color brown selected, it *knew* that it could not have a monopoly of this color. *There* was its mistake, if mistake there was.

We do not believe there was a mistake. We believe, in the language of Judge Sanborn (97 Fed., 785) that if one seeks a beer "made by one manufacturer rather than that prepared by another, it is his duty to examine the wrapper with such a degree of care as would ordinarily ascertain who the manufacturer of the article which he puchases is."

We respectfully ask that the judgment be affirmed.

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